No. 06-313
Title: Don Roper, Superintendent, Potosi Correctional Center, Petitioner
v.
William Weaver
Docketed: September 5, 2006
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (03-2880, 03-2938)
Decision Date: February 23, 2006
Rehearing Denied: May 31, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 29 2006	Petition for a writ of certiorari filed. (Response due October 5, 2006)
Aug 29 2006	Appendix of Don Roper, Superintendent, Potosi Correctional Center filed (Volumes I & II).
Oct 4 2006	Brief of respondent William Weaver in opposition filed.
Oct 4 2006	Motion for leave to proceed in forma pauperis filed by respondent.
Nov 21 2006	DISTRIBUTED for Conference of December 7, 2006.
Dec 7 2006	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Dec 7 2006	Petition GRANTED.
Jan 17 2007	SET FOR ARGUMENT ON Wednesday, March 21, 2007.
Jan 22 2007	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jan 22 2007	Joint appendix filed.
Jan 22 2007	Brief of petitioner Don Roper, Superintendent, Potosi Correctional Center filed.
Feb 5 2007	CIRCULATED.
Feb 12 2007	Record received from U.S.C.A. for 8th Circuit. 1 (box)
Feb 21 2007	Record received from U.S.D.C. for Eastern District of Missouri. (2 boxes)
Feb 26 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Feb 26 2007	Brief of respondent William Weaver filed. (Distributed)
Feb 26 2007	Brief amicus curiae of Interested Former Oklahoma City Bombing Prosecutors filed. (Distributed)
Mar 13 2007	Reply of petitioner Don Roper, Superintendent, Potosi Correctional Center filed. (Distributed)
Mar 21 2007	ARGUED. For petitioner: Andrea K. Spillars, Assistant Attorney General, Jefferson City, Missouri. For respondent: John H. Blume, Ithaca, New York.

(1)

Supreme Court, U.S.
FILED

No. 06-
(CAPITAL CASE) 06-313 AUG 29 2006

OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: 573)751-3825
Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

(Capital Case)

Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

PARTIES TO THE PROCEEDING

Petitioner, Donald P. Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent William Weaver is confined. Michael Bowersox, the custodian during earlier proceedings, is no longer the Superintendent of that facility.

Respondent Weaver is a prisoner in state custody pursuant to his conviction for first degree murder for which the jury sentenced him to capital punishment. He was the petitioner in the habeas corpus proceeding in the United States District Court for the Eastern District of Missouri.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS THE WRIT SHOULD BE GRANTED 7

The lower federal courts exceeded their authority under 28 U.S.C. §2254(d)(1) because they did not give deference to the reasonable state court decision rejecting respondent's habeas claim 7

A. The Missouri Supreme Court decision is neither contrary to nor an unreasonable application of Supreme Court precedent 7

B. This Court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty

phase claim, what the due process standard would be 8

C. AEDPA bars the lower federal courts from issuing a writ unless the state court decision is contrary to or involves an unreasonable application of federal law provided by the Supreme Court 13

D. The decision of the court of appeals is strikingly similar to that of the Ninth Circuit in Muladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005) 14

E. The prosecutor's argument was reasonable 15

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995) ... 9, 20

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds, 478 U.S. 1015 (1986) 9, 17, 18, 19

Buchanan v. Angelone, 522 U.S. 269 (1998) 11

Caldwell v. Mississippi, 472 U.S. 320 (1985) ... 12, 13, 20

Carey v. Muladin, 126 S.Ct. 1769 (2006) 15

Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999) 17

Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000) 9, 12

Crane v. Kentucky, 476 U.S. 683 (1985) 10

Darden v. Wainwright, 477 U.S. 168 (1986)10, 12, 13,15

Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987) 17

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 10,12, 15

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986) 9

Estelle v. Williams, 425 U.S. 501 (1976) 15

Ewing v. California, 538 U.S. 11 (2003) 10

Gates v. Zant, 863 F.2d 1492 (11th Cir. 1989) 13

Gilmore v. Taylor, 508 U.S. 333 (1993) 10

Harmelin v. Michigan, 501 U.S. 957 (1991) 11

Holbrook v. Flynn, 475 U.S. 560 (1986) 15

James v. Bowersox, 187 F.3d 866 (8th Cir. 1999) 9

Kane v. Espitia, 126 S.Ct. 407 (2005) 8, 14

Lockyer v. Andrade, 538 U.S. 63 (2003) 8, 14

Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) 9

Mitchell v. Esparza, 540 U.S. 12 (2003) 14

Muladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005) . . 15

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) 9

Ramdass v. Angelone, 530 U.S. 156 (2000) 10

Richard Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) 9

Romano v. Oklahoma, 512 U.S. 1 (1994) 11, 12

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999) 9

State v. Weaver, 912 S.W.2d 499 (Mo. banc 1995) . 5,8

Strickland v. Washington, 466 U.S. 668 (1984) 20

Sublett v. Dormire, 217 F.3d 598 (8th Cir. 2000) 9

Teague v. Lane, 489 U.S. 288 (1989) 10, 11

United States v. Johnson, 968 F.2d 768 (8th Cir. 1992) 9

Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001) . . 5

Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006) . . . 6

Weaver v. Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9, 1999) 5

Weaver v. Missouri, 519 U.S. 856 (1996) 5

William Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986) 9

Yarborough v. Alvarado, 541 U.S. 652 (2004) . . 14, 15

Zant v. Stevens, 462 U.S. 862 (1983) 11

Statutes & Rules

28 U.S.C. §1254 (2000). 1

28 U.S.C. §2254 (2000) 1, 2, 5, 6, 8, 11

Federal Rule of Appellate Procedure 35 7

Missouri Supreme Court Rule 29.15 5

OPINIONS BELOW

The February 14, 2006 decision of the United States Court of Appeals for the Eighth Circuit, from which petitioner seeks review, is reported at 438 F.3d 832 (8th Cir. 2006) (as corrected on February 23, 2006) and is published in the Appendix - hereinafter App. A-2. The district court's May 7, 2003 decision is unreported but is published in the App. A-23. An earlier decision by the Court of Appeals is reported at 241 F.3d 1024 (8th Cir. 2001) and is published in the App. A-187. An earlier decision by the district court is also unreported but is published at App. A-203.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on February 16, 2006, and corrected on February 23, 2006 (App. A-2). The court of appeals denied rehearing and rehearing en banc on May 31, 2006 (App. A-220). Petitioner invokes this court's jurisdiction under 28 U.S.C. §1254(1) (2000). The court below had jurisdiction under 28 U.S.C. §2254 (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, Section 1:

> [Nor] shall any State deprive any person of life, liberty or property, without due process of law
> . . . .

28 U.S.C. §2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-0132, §104(3), 110 Stat. 1214, 1219 (AEDPA).

STATEMENT OF THE CASE

Respondent William Weaver was convicted of a murder he committed nineteen years ago. After the state courts reviewed and upheld his conviction and sentence, he sought a writ of habeas corpus from the federal courts. Eventually, the district court granted the writ on the basis that Weaver's due process rights were violated by the prosecutor's penalty phase closing argument. Notwithstanding the lack of controlling authority from this court, a panel of the court of appeals affirmed on a 2 - 1 vote. Rehearing en banc was denied on a 5 -5 vote.

1. The Murder

Before July, 1987, Charles Taylor and member of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution began against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.

On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home in the Mansion Hills apartment complex in St. Louis, Missouri. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver was suppose to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area

where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area and shot Taylor again. Taylor died from several gun shot wounds to the head.

Weaver and Shurn drove rapidly from the murder scene. Witnesses at the scene immediately reported the incident to the police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street and sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from home. He claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from Shurn's car after the crash.

While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that Weaver told him he was a hit man on the streets, that Weaver and Shurn had killed Charles Taylor, and that Weaver's testimony at trial would be that he was merely out jogging when the police stopped him.

2. The Trial, Post-Conviction Proceedings Appeal

At trial, the jury found Weaver guilty of first degree murder and recommended a sentence of death. The jury found three statutory aggravating circumstances in the murder of Charles Taylor: 1) that the murder involved depravity of mind, and as a result thereof, the murder was outrageously and

wantonly vile, horrible and inhuman; 2) Weaver murdered a potential witness; and 3) Weaver acted as an agent for another (App. A-313-14). Accepting the jury's recommendation, the trial court sentenced Weaver to death.

Weaver filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the court denied the motion (App. A-258).

Weaver pursued a consolidated appeal with the Supreme Court of Missouri. That court affirmed Weaver's conviction and sentence and affirmed the denial of post-conviction relief. State v. Weaver, 912 S.W.2d 499 (Mo. banc 1995) (App. A-221). This court denied review. Weaver v. Missouri, 519 U.S. 856 (1996).

3. Habeas Proceedings

Weaver pursued federal habeas corpus relief under 28 U.S.C. §2254 (2000). The United States District Court for the Eastern District of Missouri granted the petition and set aside the conviction and sentence. Weaver v. Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9, 1999) (App. A-203). The United States Court of Appeals for the Eighth Circuit reversed the grant of habeas relief. Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001) (App. A-187).

On remand, the district court granted relief as to the penalty phase only. William Weaver v. Michael Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003) (App. A-23). The district court granted relief because it felt that Weaver's due process rights were violated by the prosecutor's penalty phase closing argument (App. A-56-72).

In a decision where each judge wrote separately, the court of appeals affirmed the district court's judgment in a 2 -

1 decision. Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006) (App. A-2).

In the panel opinion, Judges Melloy and Bowman determined that review of the closing argument claim should be under the standard set forth by Congress in 28 U.S.C. §2254(d) (App. A-9, A-20). And Judges Melloy and Bye concluded that the Missouri Supreme Court's resolution of the penalty phase closing argument issue was unreasonable (App. A-11, A-16). Senior Judge Bowman dissented because there are no Supreme Court precedents that touch "on the distinct claims of prosecutorial misconduct on which the writ was granted" (App. A-21).

On May 31, 2006, the court of appeals denied the petition for rehearing. The court also denied the petition for rehearing en banc in a 5 -5 decision (App. A-220).[1]

---

[1]Circuit Judge Benton did not participate in the consideration or decision of the matter (App. A-220). He was a member of the Missouri Supreme Court that unanimously affirmed the conviction and sentence (App. A-256). And the dissent from the panel decision, Senior Judge Bowman, did not vote on the petition for rehearing en banc because he was a senior judge who was not "in regular active service." Federal Rule of Appellate Procedure 35(a).

REASONS FOR GRANTING THE WRIT

The lower federal courts exceeded their authority under 28 U.S.C. §2254(d)(1) because they did not give deference to the reasonable state court decision rejecting respondent's habeas claim.

The court of appeals violated AEDPA by failing to defer to a state court's decision that reasonably fits within the matrix of this court's broad due process standard, and by granting relief on the basis of its own circuit law rather than on the law "clearly established" by the holdings of this court's precedents. In addition, the court granted a new penalty phase proceeding based on the prosecutor's penalty phase argument that is neither erroneous nor prejudicial. Accordingly, this court should issue a writ of certiorari to review and then reverse the judgment of the court of appeals.

A. The Missouri Supreme Court decision is neither contrary to nor an unreasonable application of Supreme Court precedent.

The Eighth Circuit based its grant of habeas relief on its own circuit court cases and without deference to the Missouri Supreme Court's decision in violation of AEDPA.

"A necessary condition for federal habeas relief here is that the state court's decision be 'contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Kane v. Espitia, 126 S.Ct. 407, 408 (2005) (per curiam) (quoting 28 U.S.C. §2254(d)(1)). In determining what constitutes clearly established federal law for purposes of §2254(d)(1), only this Court's holdings from the time the state court rendered its decision - - not dicta or circuit court authority - - are

controlling. Id. at 408; Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).

No Supreme Court authority addresses the constitutionality of the prosecutor's penalty phase closing argument like the one presented by the prosecutor in the present case. See Kane v. Espitia, 126 S.Ct. at 408. In particular, there are no cases that hold when a prosecutor's penalty phase closing argument is erroneous under the Due Process Clause or what level of prejudice must be demonstrated to warrant a new penalty phase.

During Weaver's direct appeal, the Missouri Supreme Court considered the complained-of argument in detail and found that it did not warrant a new trial. State v. Weaver, 912 S.W.2d 499, 512-14. In summary, the Missouri Supreme Court found the penalty phase arguments were reasonable; thus, it concluded that the trial court did not abuse its discretion in permitting the argument. Id. at 514. Reviewing the state court decision under §2254(d) should reveal that the state court's decision was a reasonable one.

B. This Court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the due process standard would be.

The dissent from the court below would not grant habeas relief on the penalty phase closing argument issue because the state court's decision was neither contrary to nor an unreasonable application of federal law from the Supreme Court (App. A-20). And review of the panel majority decision amply demonstrates that the dissent was correct.

In Section IV of the panel majority opinion, the panel rejected this argument by referring to these circuit precedents: Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995); Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989); James v. Bowersox, 187 F.3d 866 (8th Cir. 1999) (non-capital punishment case); Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999); Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995); Sublett v. Dormire, 217 F.3d 598 (8th Cir. 2000) (non-capital punishment case); United States v. Johnson, 968 F.2d 768 (8th Cir. 1992) (non-capital punishment case) (App. A-12 to 15). These decisions are not "clearly established federal law" from the United States Supreme Court. And to the contrary, the current touchstone of due process, penalty phase prosecutorial argument analysis is a set of en banc decisions from the Eleventh Circuit. See Newlon v. Armontrout, 885 F.2d at 1337, 1338 citing Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds, 478 U.S. 1015 (1986); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986); William Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986); (en banc); cert. denied, 480 U.S. 911 (1987); Richard Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc). Whether this court will adopt all, none or part of the analysis of these decisions as its Fourteenth Amendment prosecutorial penalty phase closing argument rubric is unknown.

The panel majority does refer to some Supreme Court decisions, but those decisions do not involve a Fourteenth Amendment/due process challenge to the penalty phase closing argument by the prosecutor (App. A-12 to 14). The panel cites Darden v. Wainwright, 477 U.S. 168, 181 (1986), but that decision concerned a guilt phase closing argument, not a penalty phase closing argument. In Darden, the prosecutor referred to the defendant as an animal, but the court rejected the claim that a new trial was warranted on the basis of that statement. This decision has been described as an "imprecise

command." Ewing v. California, 538 U.S. 11, 33 n.2 (2003) (Stevens, J., dissenting); see also Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("constitutional line drawing" concerning guilt phase argument is "necessarily imprecise."). The panel did not grant relief because the prosecutor called Weaver an animal or the like. Assuming that the Darden standard should apply to penalty phase closing argument in addition to guilt phase closing argument, see Ramdass v. Angelone, 530 U.S. 156 (2000), the standard provided by Darden, "a prosecutor's argument violates due process if it 'infect[s] the trial with unfairness'" does not provide guidance for application to a complaint about a prosecutor's penalty phase closing argument.

An example in the context of non-retroactivity under Teague v. Lane, 489 U.S. 288 (1989) illustrates this point. In Gilmore v. Taylor, 508 U.S. 333 (1993), the offender contended that the complained-of jury instruction "interfered with his fundamental right to present a defense." Id. at 343. While such a constitutional right existed at the time of the offender's trial, id. quoting Crane v. Kentucky, 476 U.S. 683, 690 (1985) (right to present evidence supporting defense), the court declined to generalize the proposition to constitutionalize guilt phase jury instruction claims. "And the level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our Teague inquiry." Id. at 342. In the language from Justice O'Connor's concurrence, the court's previous decision did not resolve conclusively the issue in the offender's favor; thus, the Illinois state courts acted reasonably in rejecting the offender's claim of constitutional error. See id. at 351 (O'Connor, J., concurring in judgment). Similarly, the statement that the constitutional criteria is whether the argument "infects the trial with unfairness" is such a generality that a specific application of the generality is not "clearly established" federal law within the meaning of §2254(d). Stated another way, if the due process

constitutional criteria for a new trial or penalty phase is whether the original trial was "unfair," then the phrase "clearly established federal law" would serve no function in distinguishing between clearly established federal law and that which is not clearly established.

The panel majority also cited other United States Supreme Court decisions construing the Eighth Amendment Cruel and Unusual Punishments Clause, not the Fourteenth Amendment's Due Process Clause. For example, in Zant v. Stevens, 462 U.S. 862 (1983), the issue involved whether a new penalty phase was warranted when a court found a statutory aggravating circumstance invalid. The court did not decide whether or under what constitutional standard a prosecutorial penalty phase closing argument claim should be reviewed. Similarly, Buchanan v. Angelone, 522 U.S. 269 (1998) involved a challenge to the Virginia penalty phase instructions, not prosecutorial argument. Romano v. Oklahoma, 512 U.S. 1, 7 (1994) involved a challenge to the admission of evidence at the penalty phase, not prosecutorial argument. Harmelin v. Michigan, 501 U.S. 957 (1991) involved an Eighth Amendment challenge to a life sentence for possession of a controlled substance. It was fitting for the panel dissent to conclude: "None of the Supreme Court cases cited in the court's opinion touches on the distinct claims of prosecutorial misconduct on which the writ was granted" (App. A-21).

The panel majority stated it had already rejected the state's argument that this court had not addressed penalty phase closing argument previously in Copeland v. Washington, 232 F.3d at 974 (App. A-12). But to support its conclusion, the Copeland court cited Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (guilt phase argument) and Darden v. Wainwright, 477 U.S. 168 (1986) (guilt phase argument). Since both Donnelly and Darden concern guilt phase argument by a prosecutor, neither decision is a holding concerning penalty phase closing

argument, or the standard of constitutional review that should be employed. And, as noted earlier, the "imprecise" constitutional standard employed in each was "fairness" without a rubric for deciding how the argument was error or prejudicial.

The Copeland court also cited Romano v. Oklahoma, 513 U.S. at 3, but Chief Justice Reinquist articulated the issue in the Romano case as: "Petitioner contends that the admission of evidence regarding his prior death sentence undermine the Sarfaty jury's sense of responsibility for determining the appropriateness of the death penalty, in violation of the Eighth and Fourteenth Amendments. We disagree and hold that the admission of this evidence did not amount to constitutional error." Id. at 3. Romano is an evidence case, not an argument case.

And the Copeland decision cited the Supreme Court decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell, however, involved an Eighth Amendment challenge to a prosecutor's penalty phase closing argument, not a Fourteenth Amendment due process challenge to the penalty phase closing argument. In Caldwell, the Supreme Court concluded that the Eighth Amendment prohibited resting "a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." Caldwell, 472 U.S. at 329. Of course, the Eighth Amendment issue in Caldwell is much different in the Fourteenth Amendment basis for the grant of relief in the present case. In Caldwell, the prosecutor sought to minimize the jury's sense of importance by informing the jury that a death sentence would be automatically reviewable by the Mississippi Supreme Court. Id. at 325-26. In discussing Caldwell, this court later made clear that Eighth Amendment analysis applied only to prosecutorial comment that had "the effect of misleading the jury into thinking it had a reduced role in the sentencing

process." Darden v. Wainwright, 477 U.S. at 183 n.15 (1986). That such a penalty phase closing argument concerning judicial review violates the Eighth Amendment is the sole expression by this court on the topic of penalty phase closing argument. The scope of review for an Eighth Amendment claim under Caldwell is separate from the concerns of the due process clause. E.g., Gates v. Zant, 863 F.2d 1492, 1503 n.11 (11th Cir. 1989).

As should be clear at this point, the premise of the court of appeals' decision, that the Supreme Court precedents concerning Fourteenth Amendment process prosecutorial penalty phase argument is a well-defined field, is an unsupported and unsupportable premise. The panel dissent properly concluded that the state court's resolution of the penalty phase argument is reasonable given the lack of clearly established Supreme Court precedent.

C. AEDPA bars the lower federal courts from issuing a writ unless the state court decision is contrary to or involves an unreasonable application of federal law provided by the Supreme Court.

This court has held that "[t]he more general the rule, the more leeway [state] courts have in reaching outcomes in case by case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). If the constitutional rule is specific, the range of reasonable application is narrow. But if the constitutional rule is general, its meaning will emerge over time from this court. See id. at 664. The question for the federal habeas court then is whether the state court's decision fits within the overall "matrix" of this court's prior decisions. Id. at 665; see Mitchell v. Esparza, 540 U.S. 12, 17 (2003) (per curiam) ("a federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is,

at best, ambiguous."); Lockyer v. Andrade, 538 U.S. at 76 (holding where the "precise contours" of Supreme Court law were unclear, state court decision was not unreasonable).

As noted, the panel majority relied on its circuit precedent in determining that the penalty phase argument was improper. Such practice is strikingly similar to the fact pattern in Kane v. Espitia, 126 S.Ct. at 408. In Kane, this court reversed the court of appeals grant of relief when the appellate court had based its decision on circuit authority that a self-represented defendant had a constitutional right to access to law materials. Given the lower court's reliance on circuit precedent, the opinion creates uncertainty for the state courts in the Eighth Circuit. Those state courts will be unsure whether Eighth Circuit precedent is binding in criminal cases within those jurisdictions. Which, in effect, would turn the Eighth Circuit into the Supreme Court of the seven states in the circuit.

D. The decision of the court of appeals is strikingly similar to that of the Ninth Circuit in Muladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005).

Both the decision of the court below and the Ninth Circuit's decision in Muladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005) involved broad pronouncements of the regulation of a criminal trial by the Due Process Clause. Citing Estelle v. Williams, 425 U.S. 501 (1976) and Holbrook v. Flynn, 475 U.S. 560 (1986), the Ninth Circuit found due process error and an unfair trial when three spectators wore buttons displaying a picture of the victim. Neither Estelle nor Holbrook sets forth constitutionally-based rules governing the attire of spectators at a criminal trial. But the Ninth Circuit issued a writ of habeas corpus. And this court issued a writ of certiorari to review that decision. Carey v. Muladin, 126 S.Ct. 1769 (2006).

Similarly, the court below issued its writ because of the prosecutor's penalty phase closing argument even though this court has not issued a holding or for that matter, discussed a due process prosecutorial penalty phase closing argument issue. A state court's application of a broad, general pronouncement from this court, such as Estelle, Holbrook, Donnelly and Darden should be declared unreasonable very rarely. Yarborough v. Alvarado, 541 U.S. at 664. And this court may provide guidance on that rarity in its decision in Carey v. Muladin, No. 05-785 (oral argument October 11, 2006).

E. The prosecutor's argument was reasonable.

The Missouri Supreme Court's determination that the prosecutor's penalty phase closing arguments were reasonable is a rational and reasonable resolution of the constitutional claim. The court of appeals placed the prosecutor's arguments into five categories (App. A-13).[2] The first category suggested that the prosecutor drew an analogy of the role of the juror to that of a soldier who must do his or her duty and have the courage to kill (App. A-13). The panel majority conceded that this argument was "factually unique" (App. A-13), a concession the panel dissent noted meant that there had not been a Supreme

---

[2]Those categories are: 1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should "kill [Weaver] now") (App. A-13).

Court decision on the topic (App. A-20). But the words articulated by the prosecutors do not match up with the panel majority's characterization of those words (App. A-13). The prosecutor actually stated:

> If then I'll say what I said earlier. That these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

(App. A-298). There is no language by the prosecutor telling the jury that it had the duty of a soldier or to automatically "kill the enemy." The prosecutor empathized with the jury by noting that the decision to impose a death sentence was difficult. And the prosecutor should be allowed to argue that imposing death, while difficult, is at times sanctioned by the state because of compelling reasons such as national security or deterring crime. See Brooks v. Kemp, 762 F.2d at 1412. The argument also notes the somberness of the occasion when the jury considers

imposition of capital punishment. Both activities, being a juror and being a soldier, are responsibilities of citizenship and it was proper for the prosecutor to so argue. Commonwealth v. Rollins, 738 A.2d 435, 449 (Pa. 1999).

The panel majority seems to find that the argument somehow minimized the jury's responsibility to provide individual sentencing of Weaver (App. A-13). No. When reviewing the argument in its totality, the prosecutor argued, "if you want to spare his life, that's your decision; that's your decision" (App. A-275). The prosecutor argued that there were four statutory aggravating circumstances (App. A-285). The defense counsel also encouraged individualized sentencing of Mr. Weaver (App. A-286 to 92). The prosecutordid not urge execution merely because Weaver was part of a broader criminal element. See Davis v. Kemp, 829 F.2d 1522, 1527 (11th Cir. 1987). And the penalty phase jury instructions properly instructed the jury under Missouri law (App. A-300 to 12). The court instructed the jury that argument was not evidence (App. A-312). The jury found three of four submitted statutory aggravating circumstances (App. A-314). The record amply reflects the prosecutor, the defense attorney and the courts giving argument and instruction on individualized sentencing. There was no error and no prejudice.

The second category of prosecutor argument was statements by the prosecutor about his personal belief in the death penalty (App. A-14). The panel majority did not identify which argument quoted in Section I of the panel majority opinion this generalization applied to. In any event, it is proper for the prosecutor to discuss the purposes of capital punishment. Brooks, 762 F.2d at 1406-07. The Brooks court noted that a prosecutor's statement of belief in the death penalty is not prejudicial given the prosecutor's vigorous argument for capital punishment in the case before the jury. And given the fact that the state legislature had enacted capital punishment, the

prosecutor's belief merely echoed the legislative judgment. There is no error or prejudice with category 2 of the argument. Brooks, 762 F.2d at 1413 n.47.

The panel majority criticizes category 3 which is labeled as arguments concerning the "war on drugs" (App. A-14). The constitutional criticism of this argument appears to be the same as with category 1, the lack of individualized sentencing (App. A-14). But the main thrust of the prosecutor's argument was not to exhort the jury to impose the death penalty because petitioner was a member of the criminal element; instead, the prosecutor suggested to the jury that capital punishment should be imposed because of the execution-styled murder was horrible, the evidence of guilt was overwhelming, petitioner showed no remorse and there was no chance that petitioner could be rehabilitated. The prosecutor's rhetoric was based on the brutal nature of the murder, which should be constitutionally appropriate. Both the prosecutor and the defense counsel encouraged the jury to determine punishment based upon the facts and circumstances of petitioner's case. And the jury instructions properly informed the jury of its responsibility to impose sentence based upon the facts and circumstances in mitigation in aggravation. Again, this is the form of analysis performed by the en banc Brooks court, 762 F.2d at 1414-15, analysis omitted by the panel majority (App. A-14 to 15).

The fourth category of argument was that the prosecutor had a special position of authority and he decided to seek capital punishment. Omitted from the listing of categories is the fact that Weaver objected to that argument. The trial court sustained the objection and instructed the jury to disregard the statement (App. A-7, A-297 to 98). This category is neither error nor prejudicial.

The fifth category that the panel majority condemns is argument designed to appeal the emotions of the jury (App. A-14). The panel majority's articulation is unclear. If the panel is complaining that the prosecutor presented his argument with zest, then this complaint fails to state a constitutional claim. "A permissible argument, no matter how 'prejudicial' or 'persuasive' can never be unconstitutional." Brooks, 762 F.2d at 1403. Recognizing that capital sentencing is an emotional issue, the Brooks court would not declare an argument violative of the constitutional merely because of such emotion. Id. 1404-05.

The panel majority seems to criticize the argument because it implored the jury to kill the defendant immediately (App. A-14). But after that characterization (App. A-14), the panel majority does not link the characterization to any of the particular arguments made by the prosecutor (App. A-14). Perhaps the panel majority was referring to the following statement:

> Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self defense. Well, it was right to kill then and it's right to kill him now.

(App. A-277). Petitioner respectfully disagrees with the characterization that that language is designed "to appeal to the emotions of the jury." Such language does not appear emotionally based. And the Eighth Amendment principles in Caldwell require the jury to feel that its verdict will actually be carried out and not that another court will determine the

appropriate punishment. Emphasizing to the jury the importance of its role in imposing sentence should not violate the federal constitution.

The question of how much prejudice Mr. Weaver must show before being entitled to a new trial is a question that is not answered by this court's precedent. At the local level, the court of appeals requires the offender to demonstrate that "there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all the aggravating and mitigating circumstances" (App. A-12 quoting Antwine v. Delo, 54 F.3d 1357, 1363 (8th Cir. 1995)); see Strickland v. Washington, 466 U.S. 668 (1984). While that is the prejudice standard articulated, the court of appeals failed to conduct prejudice analysis on any of the categories of argument (App. A-15). The panel majority did not examine the facts surrounding the offense, the overwhelming evidence of guilt, the jury's finding of three statutory aggravating circumstances beyond a reasonable doubt, the lack of mitigating evidence, or the like in determining whether there was sufficient prejudice to set aside the opinion (App. A-15), assuming that is even the standard of prejudice this court eventually selects as being appropriate.

CONCLUSION

For the foregoing reasons, respondent prays the court grant the petition for writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-3825

Counsel for Petitioner

Supreme Court, U.S.
FILED
AUG 29 2006
OFFICE OF THE CLERK

No. 06-313

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX TO PETITION
VOL. I OF II

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-3825

Attorneys for Petitioner

TABLE OF CONTENTS

Opinion in William Weaver v. Michael Bowersox, Nos. 03-2880/2938 (8th Cir. February 16, 2006 (corrected February 23, 2006)) A-2

Memorandum & Order in William Weaver v. Michael Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003) A-23

Opinion in William Weaver v. Michael Bowersox, No. 99-3462 (8th Cir. February 23, 2001) A-187

Memorandum & Order in William Weaver v. Michael Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9, 1999) A-203

Order Denying Rehearing and Rehearing En Banc in William Weaver v. Michael Bowersox, Nos. 03-2880/2938 (8th Cir. May 31, 2006) ... A-220

Opinion of the Missouri Supreme Court in State v. Weaver, No. 71051 (Mo. banc Dec. 19, 1995) A-221

Findings of Fact and Conclusions of Law in William L. Weaver v. State of Missouri, No. 603615 (St. Louis County Circuit Court Nov. 29, 1994) 258

Transcript of penalty phase closing argument in State of Missouri v. William L. Weaver, No. 565118B .. 274

Penalty phase jury instructions in State of Missouri v. William L. Weaver, No. 565118B (St. Louis County Circuit Court) 299

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 03-2880/2938

William Weaver,	*	
	*	
Appellee/Cross-Appellant,	*	
	*	Appeals from the
v.	*	United States District
	*	Court for the Eastern
Michael Bowersox,	*	District of Missouri.
	*	
Appellant/Cross-Appellee.	*	

Submitted: September 13, 2004
Filed: February 16, 2006 (Corrected 2/23/06)

Before BYE, BOWMAN, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge.

The State of Missouri appeals the grant of habeas relief to William Weaver. The district court[1] concluded that the prosecutor's closing arguments during the penalty phase of Weaver's capital murder trial violated the United States Constitution. Weaver cross-appeals the denial of his claim that the prosecutor made improper closing arguments during the guilt phase of the trial. We affirm.

---

[1]The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

I.

In separate Missouri state court trials held in 1988, William Weaver and Daryl Shurn were convicted of the execution-style shooting death of Charles Taylor. Taylor was an acquaintance of Shurn who was going to testify against Shurn in a drug case. Shurn hired Weaver to kill Taylor, and Weaver was convicted of doing so.

During his closing argument in the penalty phase, the prosecutor made a series of statements relevant to the claims in this matter. In a claim the parties identify as Claim 2E, the prosecutor made the following statements:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

Weaver's trial counsel objected to the statements as improper and misstatements of the law. The state trial court sustained the objection and issued a curative instruction for the jury to disregard the statements.

In a claim the parties identify as Claim 2F, the prosecutor made the following statements:

> Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?

> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all know that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

Defense counsel objected to the statements as improper on the grounds that they were intended to inflame and prejudice the jury. The state trial court overruled the objection.

Finally, in a claim the parties identify as part of Claim 2M, the prosecutor made statements that Weaver contends improperly focused the jury on society's general war on drugs, urged the jury to sentence Weaver to death merely to send a message to other drug dealers, and caused the jury to ignore its obligation to individualize its sentencing consideration by focusing on the particular facts involved in his case:

> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when

you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn?

Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now.

. . . .

This case - I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.

When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

. . . .

And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealer, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're guilty, we're going to give you life in prison? That's not the right message.

. . . .

The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It doesn't just pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

. . . .

> You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.
>
> . . . .
>
> It's bigger than William Weaver. And you've got to have the guts to do it. I'm the P. osecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

Weaver's counsel objected to the last statement regarding the prosecutor being the top law enforcement officer in the county who chooses the cases in which to pursue the death penalty. The trial court sustained the objection to that statement, and instructed the jury to disregard it.

The jury sentenced Weaver to death for his role in the offense.

After exhausting his state post-conviction remedies, Weaver filed a petition in federal district court under 28 U.S.C. § 2254, which, after amendment by counsel, raised twenty-two separate claims for relief. The district court granted relief on the first of those claims that Weaver's Fourteenth Amendment rights were violated when the prosecutor exercised two peremptory strikes against black venirepersons during jury selection. The State of Missouri appealed. This court reversed and remanded with instructions to address the

remaining twenty-one issues raised in Weaver's petition. Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001).

On remand, the district court again granted relief, this time on three claims related to improper closing arguments the prosecutor made during the penalty phase of Weaver's trial. The district court vacated the death sentence, and ordered that Weaver either be sentenced to life in prison without the possibility of parole or be given a new penalty-phase trial. The district court denied relief on all other claims, but granted a certificate of appealability on two claims related to closing arguments the prosecutor made during the guilt phase of Weaver's trial.

II.

We first briefly address the cross-appeal. In claims the parties identify as 2B and 2C, Weaver contends the prosecutor made six statements during the guilt-phase closing argument and rebuttal which improperly referred to the prosecutor's personal beliefs or threatened the jury. A discussion of the actual statements is not necessary because the district court determined the claims had been procedurally defaulted. As a consequence, Weaver has to show "cause and prejudice" or a "fundamental miscarriage of justice:" to have the claims reviewed. See Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("[F]ederal habeas review of [a procedurally defaulted claim] is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice.").

The district court determined Weaver failed to show cause and prejudice or demonstrate a fundamental miscarriage of justice arising from the failure to consider the claims. In an abundance of caution, the district court addressed the merits of

the claims and determined the statements did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986).

On appeal, Weaver does not address the procedural default issue. He does not argue there was cause and prejudice or that a fundamental miscarriage of justice occurred. By failing to address the procedural default issue, he has abandoned his cross-appeal. See, e.g., Etheridge v. United States, 241 F.3d 619, 622 (8th Cir. 2001) ("Claims not argued in the briefs are deemed abandoned on appeal."). We therefore decline to review the merits of Weaver's cross-appeal.

III.

We next turn to the issue of whether Weaver's claims are subject to the strictures placed on our review by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Weaver argues the Missouri Supreme Court did not address the "war on drugs" claims set out in Claim 2M. Our review of the Missouri Supreme Court decision leads to the conclusion that although the war on drugs claims were not specifically discussed, the Missouri Supreme Court did address the claims in a conclusory fashion that is sufficient to bring the case under AEDPA.

The Missouri Supreme Court addressed the appellant's claims about the prosecutor's emphasis on his position as the elected prosecutor in Section IV.A. of the opinion and a claim the prosecutor accused defense counsel of suborning perjury in closing argument in Section IV.B. Those claims were discussed in considerable detail by the Missouri Supreme Court. The Supreme Court then went on to discuss the arguments raised in Weaver's "Other Argument Section" of his state post-conviction application in Section IV.C., under the heading:

"Other Improper Argument." The Court stated in that section:

> Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

Weaver, 912 S.W.2d 499, 514 (Mo. 1995).

Our court's en banc decision in Brown v. Luebbers, 371 F.3d 458, 462 (8th Cir. 2004) held that "the 'summary nature' of the discussion of the federal constitutional question does not preclude application of the AEDPA standard." The opinion goes on to cite to James v Bowersox, 187 F.3d 866, 869 (8th Cir. 1999). In James, our court stated that "[t]he summary nature of the Missouri Court of Appeals opinion does not affect [our decision to apply the AEDPA] standard." Id. at 869.

The Seventh Circuit ruled in Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) that:

> AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court. In fact, several circuits have held that a state court need not offer *any* reasons and summarily dispose of a petitioner's claim and that summary disposition would be an adjudication on the merits. (emphasis in original)

The Missouri Supreme Court's summary disposition of Section IV.C. claims is an adjudication on the merits. We understand the concurrence's argument that the Missouri Supreme Court discussed, in a cursory fashion, some of the specific claims set out in Section IV.C., but did not specifically address the war on drugs claim. However, a decision by a state supreme court that disposes of a claim, even in a conclusory fashion, is sufficient. In this case, the Missouri Supreme Court recognized a number of claims relating to allegedly improper closing arguments and summarily denied those claims. The discussion in Section IV.C., of the Missouri Supreme Court decision, read in context with the discussions in Section IV.A. and IV.B. is sufficient under our court's interpretation of AEDPA.

IV.

Under AEDPA, a court should only grant relief if "a decision [is] contrary to, or involves an unreasonable application of, clearly established Federal law" or "a decision [is] based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. §2254(d)(1)-(2); see also Williams v. Taylor, 529 U.S. 362 (2000).

The State argues that the United States Supreme Court has not addressed improper penalty-phase closing arguments by a prosecutor. However, we have previously found that argument unpersuasive. Copeland v. Washington, 232 F.3d 969, 974 (8th Circ. 2000) (noting that "it is apparent that there are Supreme Court decisions on penalty phase closing argument" and "[t]here are also Supreme Court decisions on guilt phase closing argument that are relevant").

The prosecutor's argument violates due process if it "infect[s] the trial with unfairness." Darden 477 U.S. at 181. To determine if a prosecutor's statement infected Weaver's trial with unfairness, the court must:

> (1) Measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his [or her] argument to minimize prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all the aggravating and mitigating circumstances.

Antwine v. Delo, 54 F.3d 1357, 1363 (8th Cir. 1995) (citing Newlon v. Armontrout, 885 F.2d 1328, 1337 n.10 (8th Cir. 1989)). The court should only grant habeas corpus relief it the state's "closing argument was so inflammatory and so outrageous that any reasonable trial judge would have sua sponte declared a mistrial." James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999). Without applying AEDPA, we vacated two sentences including that of Shurn, the man who hired Weaver to kill Taylor, when the prosecutor in Weaver's trial made similar improper arguments in the penalty phase. Newlon, 885 F.2d at 1329; Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999).

The prosecutor in this case made various penalty phase statements listed in detail in Section I. These statements can be categorized into several types: (1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should "kill [Weaver] now").

Category (1) is factually unique, but contains statements similar in nature to impermissible statements made in other cases. When a prosecutor tells a jury that they have a duty to kill and, as in this case, uses a graphic story from a movie to support that duty, the statement should be taken as "calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338. Soldiers have no choice but to kill. Soldiers follow orders when they kill. The responsibility for a particular death lies, therefore, with a commanding officer or the declaration of war itself, and not with a soldier's individual conscience. Furthermore, wartime killing is not a deliberative process, not a considered choice.

Describing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment. See Zan v. Stephens, 462 U.S. 862, 879 (1983). Not only was the main thrust of the prosecutor's argument diametrically opposed to the requirement that capital sentencing be at the jury's discretion, it also "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985)." Antwine, 54 F.3d at 1361.

Categories (2), (4), and (5) are improperly inflammatory under several existing United States Supreme Court precedents. Statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury. Miller v. Lockhart, 65 F.3d 676, 684-86 (8th Cir. 1995). A prosecutor should not emphasize his or her position of authority in making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment. Newlon, 885 F.2d at 1335-37. Further, arguments against a rational decision by the jury, and specifically those that implore the jury to kill the defendant immediately, are contrary to a fair proceeding. Id. at 1336-37; see also Shurn, 177 F.3d at 667-69 (Wollman, J., concurring).

Category (3) is also factually distinct, but similar to arguments that are improper under existing law. The controlling Supreme Court precedent is well-settled and longstanding: the Eighth Amendment requires capital sentencing to be an individualized decision-making process. See, e.g., Jones v. United States, 527 U.S. 373, 381 (1999) ("In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry."); Buchanan v. Angelone, 522 U.S. 269, 274-74 (1998) (referring to "the Eighth Amendment requirement of individualized sentencing in capital cases"); Romano v. Oklahoma, 512 U.S. 1, 7 (1994) ("States must ensure that 'capital sentencing decisions rest on [an] individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the particular offense' are considered.") (quoting McCleskey v. Kemp, 481 U.S. 279, 303 (1987)); Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is

'appropriate[.]'") (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)); Zant, 462 U.S. at 879 ("What is important [from a constitutional standpoint] at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

The argument that a signal must be sent from one case to affect other cases puts a improper burden on the defendant because it prevents an individual determination of the appropriateness of capital punishment. Sublett v. Dormire, 217 F.3d 598, 600-01 (8th Cir. 2000). Further, invoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly inflammatory. Copeland 232. F.3d at 972-73. Using the conscience of the community as a guiding principle for punishment puts too significant of a burden on a single defendant. United States v. Johnson, 968 F.2d 768, 770-71 (8th Cir. 1992).

There is little doubt that the prosecutor's statements are such that we would certainly grant relief without applying AEDPA. However, case law that applies the AEDPA bar makes it a closer decision. The question for us is whether the state court made an unreasonable interpretation of federal law as required by AEDPA. The finding by our court in Copeland is illustrative on this point. In Copeland, applying AEDPA, we found that the prosecutor's arguments in the penalty phase risked creating a mob mentality by preying on the jury's fear of crime. Copeland, 232 F.3d at 975. Further, the court found that, "it was unreasonable, in light of Supreme Court precedent, to conclude that the argument did not result in a deprivation of due process." The statements in this case are more egregious and systemic than those in Copeland.

The conclusion by the Missouri Supreme Court that "the penalty phase arguments . . . [were] reasonable" is unreasonable under existing United States Supreme Court precedents. It is

unclear which precedents the Missouri Supreme Court applied. Regardless, there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents. As a result, AEDPA does not bar relief in the present matter.

V.

For the foregoing reasons, we affirm the judgment of the district court.

BYE, Circuit Judge, concurring in the result.

I agree Weaver's claims warrant habeas relief even if AEDPA's strict standard of review applies. I write separately because I do not believe AEDPA applies.

When a claim raised in state court proceedings is ignored by the state courts "we apply a pre-AEDPA standard of review." Clemons v. Luebbers, 381 F.3d 744, 756 n.8 (8th Cir. 2004) (citing Taylor v. Bowersox, 329 F.3d 963, 967-68 (8th Cir. 2003)); see also Wiggins v. Smith, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis."); Canaan v. McBride, 395 F.3d 376, 382 (7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits' for purposes of §2254(d) [and] a federal court cannot apply the deferential standard provided by 2254(d)."); Maples v. Stegall, 340 F.3d 433, 436 (6th Cir. 2003) ("Where, as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply.").

A careful side-by side examination of the claims Weaver

made in state court and the Missouri Supreme Court's opinion addressing those claims convinces me the latter ignored what Weaver referred to then as his "War On Drugs" argument, and what the Court refers to now as categories (3) and (5) of Weaver's claim, that is, the "War On Drugs" argument as well as the statements designed to appeal to the emotions of the jury.

Before the Missouri Supreme Court, Weaver made six separate arguments in a section entitled "Other Improper Arguments." The six separate arguments were as follows: 1) the prosecutor's statement that if Weaver had not run out of bullets, he would have shot a police officer; 2) the prosecutor's statement that if Weaver had not run out of bullets, he would have shot witness Jean Hanson; 3) the prosecutor's discussion of the death penalty as a deterrent to homicide in violation of a pre-trial motion in limine;[2] 4) the prosecutor's opinion there were crimes other than first degree murder for which a sentence of life without parole would be appropriate; 5) the prosecutor's claim he could have presented victim impact evidence through the victim's wife, relatives, and friends; and 6) the "War On Drugs" argument, which identified and challenged the specific portions of the sentencing transcript containing the prosecutor's

---

[2]Specifically, the prosecutor argued:

> The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this.

I set fort the specifics of this argument for the purpose of showing Weaver's "deterrent" claim was district from his "war-on-drugs" claim in state court.

statements that have been referred to as Claim 2M in the proceedings before our court.

The Missouri Supreme Court's opinion discusses only the first three of the six arguments advanced by Weaver.

> Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that [1] had Weaver not run out of bullets he would have shot the arresting officer. [2] He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. [3] Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

State v. Weaver, 912 S.W.2d 499, 514 (Mo. 1995).

In determining whether a claim has been "adjudicated on the merits" for the purpose of applying AEDPA's strict standard of review under 28 U.S.C. §2254(d), "[w]e must simply look at what a state court has said, case by case, and determine whether the federal constitutional claim was

considered and rejected by that court." Brown v. Luebbers, 371 F.3d 458, 461 (8th Cir. 2004). While I acknowledge the "summary nature of a state court's decision does not affect the applicable standard of review," Closs v. Weber, 238 F.3d 1018, 1020 (8th Cir. 2001) (citing James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999)), I submit a distinction must be drawn between summarily disposing of a claim and wholly ignoring it.

Significantly, when I look at what the state court said in this case, it is clear the state court discusses and analyzes only three of the six arguments advanced by Weaver in his "Other Improper Arguments" section. Most notably, the state court identified the third of Weaver's six arguments as his *final* argument, and nowhere discusses or analyzes Weaver's last three arguments, including his "War On Drugs" claim. I do not know what else to glean from what the state court said other than to conclude it ignored Weaver's most compelling constitutional claim.

As the Court notes, the Eighth Amendment requires capital sentencing to be an individualized decision-making process. See ante at 12. Not once, not twice, not thrice, but *seven* times the prosecutor urged the jury to ignore the individual offender, William Weaver. Instead of focusing the jurors' attention upon Weaver's character and record, and the particular circumstances of Weaver's offense, the prosecutor instead advised the jury "[t]he one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver." He told the jury "drug dealers . . . are taking our streets away from us." He advised the jury to "send a message" to "all dope peddlers and murderers in the world [for the sake of] all of us, the community. They are our streets, our neighborhoods, our family." He said drug dealers were 'society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's not deterrence. Then the whole system

fails and then chaos reigns and our streets are never safe. The dope peddlers reign."

These statements, as well as the other improper statements discussed by the Court, clearly violated Weaver's constitutional rights. I have no trouble concluding such to be the case when reviewing the district court's decision de novo or when applying the more demanding standard of review under AEDPA. I therefore concur in affirming the judgment of the district court.

BOWMAN, Circuit Judge, concurring in part and dissenting in part.

I agree with Judge Melloy that all of Weaver's claims are subject to review under the AEDPA standard and concur in Part III of his opinion. But because I do not think that the Court correctly applies that standard to Weaver's claims of prosecutorial misconduct, I respectfully dissent. Under 28 U.S.C. §2254(d)(1), as amended by AEDPA, we must accept a state court's decision on the merits of a claim later raised in federal habeas proceedings unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Court today, purporting to apply the AEDPA standard, holds that habeas relief must be granted to Weaver on his sentence.

The Court notes that several of Weaver's claims are "factually unique" or "factually distinct," presumably when compared to habeas claims adjudicated by the Supreme Court to date. ante at 10, 11. These factual distinctions alone raise red flags. I propose that it is less likely that a state court's decision will be contrary to or an unreasonable application of clearly established federal law when there are no Supreme Court cases on all fours. Moreover, the law that the Court cites

today as on point is found in opinions from this Circuit, not in opinions from the Supreme Court. "[A]s the statutory language makes clear, . . . §2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Williams v. Taylor, 529 U.S. 362, 412 (2000).

The Supreme Court cases to which the Court does refer in its opinion stand for general propositions: "[a] prosecutor's argument violates due process if it 'infect[s] the trial with unfairness,'" ante at 9 (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)); the Eighth Amendment requires that a jury not be precluded from exercising its discretion, ante at 11 (citing Zant v. Stephens, 462 U.S. 862, 879 (1983) (noting the requirement in capital cases for an "*individualized* determination" of those defendants who should receive the ultimate penalty "on the basis of the character of the individual and the circumstances of the crime")); and there is a need for "an individualized decision-making process" so that a death sentence will pass constitutional muster, ante at 11 (citing Supreme Court cases at 11-12). None of the Supreme Court cases cited in the Court's opinion touches on the distinct claims of prosecutorial misconduct on which the writ was granted.

In these circumstances, I cannot agree that the Missouri Supreme Court's decision on the issue of the prosecutor's penalty-phase argument is contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. Were it not for the AEDPA standard of review, I might agree with the result reached by the Court today. Indeed, the outcome was different - where we did not apply the AEDPA standard - in our §2254 review of Weaver's co-defendant's death sentence on grounds of improper prosecutorial closing argument in the penalty phase. Shurn v. Delo, 177 F.3d 662, 665-67 (8th Cir.), cert. denied, 528 U.S. 1010 (1999); see also Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) (affirming pre-AEDPA grant of the writ on

grounds of improper prosecutorial argument), cert. denied, 497 U.S. 1038 (1990). But under AEDPA, we are not empowered to grant the writ even though we may believe that the state court got it wrong. A state-court decision is not necessarily unreasonable because the federal habeas courts deem it to be incorrect. Williams v. Taylor, 529 U.S. at 411. "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17 (2003) (expounding the "contrary to" standard). The only issue for the federal courts in this case is whether the state court's decision was contrary to or an unreasonable application of clearly established federal law. Because of the apparent inconclusive state of Supreme Court jurisprudence on the alleged constitutional violation in this case (the Court cites no apposite Supreme Court cases), I would hold that the state court's decision was neither contrary to nor an objectively unreasonable application of federal law and would reverse the judgment of the District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-2220 CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner's First Amended Petition for Writ of Habeas Corpus filed on June 27, 1997. Respondent filed a response on September 8, 1997, and a supplemental response on September 11, 1997. Petitioner filed a traverse on January 5, 1998.

I. Procedural History.

On July 19, 1988, petitioner William Weaver was convicted of first-degree murder in the death of Charles Taylor by a jury in St. Louis County, Missouri. The next day, the jury sentenced Weaver to death.

Petitioner timely filed a pro se Motion to Vacate, Set Aside or Correct a Judgment of Guilty and of a Sentence of Death, pursuant to Missouri Supreme Court Rule 29.15 motion. Appointed counsel for petitioner timely filed an amended motion which incorporated the pro se motion and asserted additional points for relief. The state court conducted an

evidentiary hearing on petitioner's 29.15 motion on September 13-15, 1993, with a subsequent hearing on July 28, 1994. The postconviction motion court denied relief on all grounds on November 29, 1994.

Weaver appealed his conviction and sentence to the Missouri Supreme Court. Weaver's direct appeal was consolidated with his appeal from the denial of his postconviction motions. On December 19, 1995, the Missouri Supreme Court affirmed the conviction and death sentence. See State v. Weaver, 912 S.W.2d 499 (Mo. 1995) (en banc).

On April 18, 1996, Weaver filed a pro se habeas petition in federal district court. At that time, he had not yet petitioned the United States Supreme Court for review of the Missouri Supreme Court's decision affirming his conviction and death sentence. This Court dismissed his petition without prejudice to permit Weaver to fully exhaust his state remedies. Weaver petitioned the Supreme Court for a writ of certiorari, which was denied on October 7, 1996. Weaver v. Missouri, 519 U.S. 856 (1996).

On November 12, 1996, Weaver filed a second pro se habeas petition in the instant case. The Court appointed counsel to assist Weaver, and Weaver filed the instant First Amended Petition. This Court issued a Memorandum and Order on August 9, 1999, which granted petitioner a writ of habeas corpus on his Batson claim, the first claim presented in the First Amended Petition. The Eighth Circuit Court of Appeals reversed by opinion dated February 23, 2001, and directed this Court to address the remaining claims in petitioner's petition. See Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001).

II. Legal Standard.

In the earlier appeal of this matter, the Eighth Circuit

held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to the instant petition for writ of habeas corpus, because it was filed after the effective date of the AEDPA.[3] Weaver, 241 F.3d at 1029. Title I of the AEDPA significantly amends habeas corpus law. The amended version sets forth a more stringent standard for issuance of a writ of habeas corpus, and substantially limits the power of a federal court to grant a state prisoner's habeas petition on grounds decided on the merits in state court. Carter v. Kemna, 255 F.3d 589, 591 (8th Cir. 2001) (citing Williams v. Taylor, 529 U.S. 362, 412-13 (2000)), cert. denied, 534 U.S.1085 (2002).

The text of section 2254(d) establishes the state court's decision as the starting point in habeas review. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 885 (3rd Cir.), cert. denied sub nom Matteo v. Brennan, 528 U.S. 824 (1999). Under the AEDPA's standards of limited and deferential review, "Federal courts may grant habeas relief to a state prisoner on a claim only if the state court's rejection of the claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' id. § 2254(d)(2). See Lomholt v. State of Iowa, __ F.3d __, 2003 WL 1961035, *2, No. 02-2236 (8th Cir. Apr. 29, 2003) (slip op. at 4).

A state court's decision is contrary to clearly established

---

[3]Petitioner's assertions that the AEDPA does not apply to his case, and that this Court erred in dismissing his original petition for writ of habeas corpus on July 1, 1996, are moot. See First Amended Petition for Writ of Habeas Corpus, Claim Twenty-Two, p. 41.

Supreme Court precedent when it is opposite to the Supreme Court's conclusion on a question of law or different than the Supreme Court's conclusion on a set of materially indistinguishable facts. Williams, 529 U.S. at 412-13. A state court decision involves an unreasonable application of Supreme Court precedent if it correctly identifies the governing legal rules but unreasonably applies them to the facts of a prisoner's case. Id. at 407; Linehan v. Milczark, 315 F.3d 920, 924 (8th Cir. 2003). The Eighth Circuit has instructed, "As for an 'unreasonable application' of the law, we must remember that unreasonable is not the same as incorrect. Penry v. Johnson, 121 S. Ct. 1910, 1918 (2001). The state court's application might be erroneous, in our 'independent judgment,' yet not 'unreasonable.' Williams, 529 U.S. at 411." Kinder v. Bowersox, 272 F.3d 532, 538 (8th Cir. 2001).

"The factual findings of the state court also may be challenged in a § 2254 petition, but they are subject to an even more deferential review. Relief may be granted if the state court adjudication 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2). Factual findings by the state court 'shall be presumed to be correct,' a presumption that will be rebutted only by 'clear and convincing evidence.' Id. § 2254(e)(1)." Kinder, 272 F.3d at 538 .

III. Procedural Default.

"Federal habeas review is barred when a federal claim has not been 'fairly presented' to the state court for a determination on the merits." Hall v. Delo, 41 F.3d 1248, 1249 (8th Cir. 1994) (quoting Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994) (other internal citations omitted)). Even if a federal claim has been "fairly presented" to the state court, a federal court generally will decline to consider the claim if the state

court denied it on "independent and adequate state procedural grounds." Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); see also Sloan v. Delo, 54 F.3d 1371, 1378 (8th Cir. 1995) ("If a state court finds that a defendant defaulted a claim under a state procedural rule, . . . federal courts generally will not consider it on habeas review."), cert. denied, 516 U.S. 1056 (1996). "To bar consideration of a defaulted claim on federal habeas review, the state's procedural rule must have been 'firmly established and regularly followed' when it was applied to the petitioner." Sloan, 54 F.3d at 1380 (quoting Ford v. Georgia, 498 U.S. 411, 421-25 (1991)).

"Missouri procedure requires that a claim be presented 'at each step of the judicial process' in order to avoid default." Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994), cert. denied, 513 U.S. 983 (1994) (quoting Benson v. State, 611 S.W.2d 538, 541 (Mo. Ct. App. W.D. 1980)). Claims that are not raised on direct appeal or in postconviction Rule 29.15 proceedings or the appeal thereof generally are barred. See LaRette v. Delo, 44 F.3d 681 (8th Cir.) (citing Kennedy v. Delo, 959 F.2d 112, 115-16 (8th Cir.), cert. denied, 506 U.S. 857 (1992) (claims first raised in motion to recall the mandate are barred), and Byrd v. Delo, 942 F.2d 1226, 1231-32 (8th Cir. 1991) (claims first raised in state habeas petition are barred)), cert. denied sub nom LaRette v. Bowersox, 516 U.S. 894 (1995).

A Missouri court may "lift" the bar on an otherwise procedurally defaulted claim by reviewing the claim on the merits. Jolly, 28 F.3d at 53-54; Byrd, 942 F.2d at 1230. See also Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991) ("State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal review that otherwise might have been available.")

Absent a decision by a state court to lift the bar on an otherwise procedurally defaulted claim, a federal court will not consider the claim unless the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Objective factors that constitute cause include 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" McCleskey v. Zant, 499 U.S. 467, 494 (1991) (quoting Murray, 477 U.S. at 488 (internal citations omitted)).

IV. Statement of Facts.

The Court offers the following statement of facts, adopted in its entirety from the opinion of the Missouri Supreme Court, solely for informational purposes:

> Prior to July 1987, Charles Taylor and members of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution had been commenced against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.
>
> On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's

home in the Mansion Hills apartment complex. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver was supposed to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area where Taylor had fallen and shot Taylor again. Taylor died from several gunshot wounds to the head.

Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest Apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street, sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from home. He

> claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from the Shurn car after the crash.
>
> While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that Weaver told him he was a hit man on the streets, that defendant and Shurn had killed Charles Taylor, and that defendant's testimony at trial would be that he was merely out jogging when the police stopped him. Weaver's primary defense at trial was misidentification by police.

State v. Weaver, 912 S.W.2d at 507-08.

V. Discussion.

A. Claim Two: Improper Arguments by Prosecutor.[4]

In his second claim for relief (Claims 2.B. through 2.M.), petitioner asserts that the prosecuting attorney made improper statements in his guilt and penalty phase closing arguments, which violated petitioner's right to due process on the issue of punishment. Petitioner contends that the prosecutor's improper statements violated his rights under the Sixth, Eighth and Fourteenth Amendments. Petitioner asserts that twelve separate statements were improper as either

---

[4]As previously stated, petitioner's first claim, the Batson claim, was addressed in the Memorandum and Order of August 9, 1999, and the subsequent appeal.

injecting the prosecutor's personal beliefs, threatening the jury, appealing to jurors' fears and emotions, arguing irrelevant and immaterial issues, or arguing that defense counsel had tried to create "smokescreens," knowingly fabricated petitioner's defense, and had been involved in obtaining perjured testimony. The subpoints of Claim Two are set forth and labeled in the same manner as in the First Amended Petition:

> B. As part of the initial guilt phase closing argument, the prosecutor said, "He's guilty as charged and I think the evidence has proved it and I think he's guilty of murder in the first degree (Tr. 1645). . . . But it's murder first degree or it's nothing." . . .
>
> "[I]n my opinion, the only reason we've been here is because the guilt is obvious. Your decision in this case is trying to decide whether he should die or go free. The guilt is obvious." (Tr. 1647).
>
> C. During the guilt phase rebuttal argument the prosecutor said, "And, yet, I stand here afraid, afraid that because Doris Black is so good and because you people may get confused . . . If you do, then a hit man goes free." (Tr. 1713).
>
> "Come on. All these coincidences you can't believe. It's nonsense. If you don't believe the state's case here, you twelve people will never convict anybody." (Tr. 1710).
>
> "But in order for you to let him go, you've got to believe that all this perjury was involved, that I was part of it." (Tr. 1721).
>
> D. During the initial penalty phase argument, the prosecutor said, "Well if this isn't it, what would it

be? If this isn't a case where you can impose a death penalty, where people would go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? So if you were being honest to me when you said that, then that has to be the case." (Tr. 1761).

"If this isn't a case that calls for the death penalty, I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said you would prefer it, that you would favor it in the right case. This is the right case." (Tr. 1762).

"I mean if this isn't the case for the death penalty, then there's no case you'll do it." (Tr. 1765).

E. The prosecutor continued during the penalty phase rebuttal argument, "So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that, but that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty." (Tr. 1778).

F. During the penalty phase rebuttal argument, the prosecutor stated, "Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it? I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers.

And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do." (Tr. 1782-83).

G. The prosecutor also argued during the penalty phase rebuttal that a police officer and a witness would have been killed if facts were different: "William Weaver ran out of bullets. Think back to the evidence. I'm sure you discussed it yesterday. But when you discuss his fate, think about the evidence. He ran out of bullets and Charles Taylor was still alive. So when they go back, he's reloading. All six spent casings are on the floorboard right where he was and he's reloading while Daryl is driving and they stop and he goes back and shoots him some more. Then I'm going to tell you that he was out of bullets, because if he hadn't been, Officer Crain would have been dead because he would have kept the gun on him instead of pitching it out of the car."

H. After objection, the prosecutor continued, "If he had still had the gun and still had bullets, do you think he would have sure surrendered as meek as a lamb? I mean, of course, he wouldn't have surrendered. What if Jean Henson would have been jogging a little bit later than she was and coming around the woods or the clearing at the time of the murder and he still had some bullets. You think she would be alive?" (Tr. 1762-64).

I. During the guilt phase, the prosecutor argued, "And now, of course, Mr. Weaver is here lying to you and telling you he didn't do it and wanting you to believe that and hoping through the assistance of Ms. Black--who is just about as capable a defense attorney as you're going to find in these cases--that enough confusion, enough smokescreens, enough whatever has been created to put in your mind some reasonable doubt as to his guilt." (Tr. 1645).

J. Over objection, the prosecutor continued, "But as the case unraveled, I'm sitting there listening to all this and I've got my back to you people, and I don't know what impact the things elicited by Ms. Black may have had on you. I don't know whether you think these little mole hills that Ms. Black talked about are now mountains in your mind or if they are still mole hills. I don't know whether the smokescreen she's creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see it's nothing more than a smokescreen and you're waiting to get to the jury room to render a verdict of guilty.

"But at this point, you've heard all the evidence you're going to hear. But that's all you heard for four or five days was a harangue to try to create confusion out of nothing, to try to get a police officer to make one little mistake which then makes him a liar, one inconsistency, whatever, and they are liars; they are perjurers. Just create whatever smokescreen you have. So the last day or two, I've been concerned what impact this is having on the jury.

"Well last night when I'm trying to decide exactly what I'm going to say to you and I cleared all the smoke away and all the harangue and all the noise,

you're left with nothing more than the facts." (Tr. 1648-49).

K. The prosecutor stated, "And by the way, I'm not even convinced the girl was having an affair with him. I think they found a young girl and she may be willing to come in here and be the heroine this week. Ms. Black talked about her being so embarrassed, how difficult it was for her to testify. She came back the next day and sat in the first row and for three or four more days. She's the star of the show. She is the heroine." (Tr. 1665).

M. Finally, petitioner also objects to the prosecutor's argument during the penalty phase that the death sentence was appropriate due to petitioner's connection to the Shurn family and their drug operation (Tr. 1760, 1776, 1777), on the basis that there was no evidence petitioner had knowledge of the Shurn family's drug trade. Petitioner argues there are no facts in the record to support the argument that petitioner would have shot a police officer and a witness if he had not run out of bullets (Tr. 1762-64). Petitioner argues that the prosecutor's argument the death penalty is a deterrent (Tr. 1778-79), was without factual basis. Petitioner argues the prosecutor's "war on drugs" argument (Tr. 1759, 1768, 1776-77, 1779, 1781) was intended to appeal to the jury's passions and inflame them.

Petitioner presented the majority of these points to the Missouri Supreme Court, which resolved the issues as follows:

> Defendant argues that the state's closing arguments during both the guilt and penalty phases were erroneous and further that counsel

was ineffective in failing to object to some of the improper arguments. A review of the record discloses that defense counsel objected vehemently to almost all the arguments complained of here and that several of the objections were sustained, followed by curative instructions to the jury. The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted. *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo. 1982). Our review of the arguments discloses neither error in permitting the arguments nor ineffective assistance of counsel in failing to object.

A.

First, Weaver alleges that the prosecutor improperly emphasized his position as elected prosecutor in his choice of seeking the death penalty. The specific arguments were as follows:

(1) In the guilt phase, the prosecutor said, "If you don't believe the state's case here, you twelve people would never convict anybody." Defense counsel objected, and the court instructed the jury to disregard the comment.

(2) In the penalty phase closing, the prosecutor said, "Well, if this isn't [the proper case for the death penalty], what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case

would you ever return it in? . . . If this isn't a case that calls for the death penalty, I can't imagine one that would." The court overruled defense counsel's objection to this argument.

(3) Continuing his penalty phase closing argument, the prosecutor said, "I mean, if this isn't the case for the death penalty, then there's no case you'll do it . . . and, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty . . . I'm the prosecuting attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." The trial court sustained the defendant's objection to the last statement and instructed the jury to disregard it.

(4) Finally, the prosecutor said, "If these facts don't justify, don't cry out for the death penalty, then which facts do?" To that statement, the trial court overruled the objection.

A prosecutor's argument may make reasonable inferences from the evidence. *Shurn*, 866 S.W.2d at 460; *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983), *cert. denied*, 471 U.S. 1009, 105 S. Ct. 1875, 85 L.Ed.2d 168 (1985). The inferences need not necessarily seem warranted. *Grubbs v. State*, 760 S.W.2d 115, 119 (Mo. banc 1988), *cert. denied*, 490 U.S. 1085, 109 S. Ct. 2111, 104 L.Ed.2d 672 (1989). Statements by a prosecuting attorney in argument indicating his or her opinion that the accused is guilty, where it is apparent that such opinion is based on the evidence in the case, is

permissible. *State v. Moore*, 428 S.W.2d 563, 565 (Mo. 1968); *State v. Paglino*, 319 S.W.2d 613, 625 (Mo. 1958). In this case, the prosecutor's rhetorical questions may seem flamboyant, if not somewhat abrasive, to a juror's ears. However, given the eyewitness testimony of how the murder was carried out and the cold execution manner in which the victim was killed, it is fair for the prosecutor to point out the strength of the state's case. The use of the rhetorical questions was, for the most part, a fair comment on the strength of the case.

As for his statements regarding his position as prosecuting attorney of the county, the court properly sustained the objections and directed the jury to disregard the argument. Trial courts have a superior vantage point from which to assess the pervasive effect of an improper argument. Thus, whether it can be dissipated by timely and appropriate action short of declaring a mistrial is a matter within the sound discretion of the trial court. *State v. Carter*, 641 S.W.2d 54, 60 (Mo. banc 1982), *cert. denied*, 461 U.S. 932, 103 S. Ct. 2096, 77 L.Ed.2d 305 (1983).

This case is distinguishable from cases relied on by the defendant, including *State v. Evans*, 820 S.W.2d 545 (Mo.App. 1991). There the prosecutor said, "If [the defendant] were innocent, I wouldn't bring a charge." *Id.* at 547. Merely stating that the prosecutor determines which penalty to ask for in capital cases is not the same as saying that if the defendant were innocent, he would not be charged. The objection, followed by the curative instruction,

is adequate here.

In addition, this case is distinguishable from *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). There the court found that because the prosecutor expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant, under the totality of the circumstances rendered the penalty phase of the trial fundamentally unfair. 885 F.2d at 1336-37. The arguments here do not rise to the level of the egregious conduct that is reported in *Newlon*. Neither is this case comparable with *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), where this Court reversed the punishment in a capital case because the prosecutor, among other excesses, had compared the brutality of the murder as being worse than all other murders in the county. Here there was no abuse of discretion in the trial court's ruling on defense counsel's objections.

B.

In his closing remarks, the prosecutor called the defendant's misidentification defense a "cock and bull story" and a "smokescreen," referred to the defendant as a liar, said defense counsel was "bold" and called in question the credibility and motives of several defense witnesses. Weaver characterizes the state's closing arguments as portraying defense counsel as having suborned

perjury. Comments to the effect that a defendant or a defense witness were lying have repeatedly been upheld. A prosecuting attorney may comment on the evidence and the credibility of [a] witness and, in the process, may belittle and point to the improbability and untruthfulness of specific testimony. *State v. Johnson*, 496 S.W.2d 852, 859 (Mo. 1973). Here the comments on the testimony of the witnesses were well within the range of the prosecutor's adversarial responsibilities in making closing argument.

Directly arguing that defense counsel has suborned perjury or fabricated evidence has been held to be prejudicial error. *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App. 1989); *State v. Harris*, 662 S.W.2d 276, 277 (Mo.App. 1983). However, the prosecutor here did not go that far when he said:

> I don't know whether the smokescreen [defense counsel is] creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see, it's nothing more than a smokescreen . . . .
>
> [Defense counsel has] got the nerve to show you these photographs that she said look like they were taken at nighttime. I guess you just have to believe with somebody that bold that she is going to suggest

> that was taken at night time as opposed to bad exposure, if you want to buy that boldness.

To suggest that the arguments advanced by defense counsel are "smokescreens" or "bold" fall far short of accusing counsel of suborning perjury or the other egregious accusations against defense counsel that occurred in *Burnfin, Harris*, or other cases relied on by the defendant. At most, the comments by the prosecuting attorney were near error which, by definition, is not error. The point is denied.

C.

Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial

> court abused its discretion in permitting the argument is without merit. The point is denied.

See Respondent's Ex. G, pp. 14-16; Weaver, 912 S.W.2d at 512-14.

The Court begins with the opinion of the Missouri Supreme Court. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(2). See Linehan, 315 F.3d at 924.

Federal law regarding prosecutorial overreaching in closing arguments is clearly established. The Supreme Court has ruled it is not enough that a prosecutor's comments were undesirable or even universally condemned. In order to be a constitutional violation, a statement by a prosecutor in closing argument of the guilt phase must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). The Eighth Circuit has stated with respect to improper penalty phase argument, "it would seem that there should be a more searching review of the penalty phase as the Eighth Amendment is implicated." Copeland v. Washington, 232 F.3d 969, 974 n.2 (8th Cir. 2000) (applying AEDPA standard, vacating death sentence based on improper argument by prosecutor during penalty phase), cert. denied, 532 U.S. 1024 (2001). The Court in Copeland noted that the Eighth Circuit has vacated a death sentence based on improper closing argument during the penalty phase in three other recent cases. See Shurn v. Delo, 177 F.3d 662 (8th Cir.), cert. denied sub nom Shurn v.

Bowersox, 528 U.S. 1010 (1999); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), cert. denied sub nom Bowersox v. Antwine, 516 U.S. 1067 (1996); Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied sub nom Delo v. Newlon, 497 U.S. 1038 (1990).

This Court will discuss separately the challenged arguments in the guilt and penalty phases. The Court will also consider the cumulative effect of the challenged arguments. United States v. Young, 470 U.S. 1, 11-12 (1985) (to decide the effect of a prosecutor's remarks, a court examines the totality of the circumstances and the remarks within the context of the trial).

1. Guilt Phase.

Petitioner objects to a number of separate statements by the prosecutor during the guilt phase closing argument and rebuttal argument.

a. Claims 2.B. and 2.C.: Prosecutor's Personal Beliefs; Threats to Jury.

Petitioner argues that the prosecutor subjected the jurors to improper argument by means of six statements which asserted his personal beliefs and threatened the jury. The statements at issue made during the initial closing argument are:

> "He's guilty as charged and I think the evidence has proved it and I think he's guilty of murder in the first degree (Tr. 1644-45). . . . But it's murder first degree or it's nothing." . . . (Tr. 1645).
>
> "[I]n my opinion, the only reason we're here [is] because the guilt is obvious. Your decision in

> this case is trying to decide whether he should die or go free. The guilt is obvious." (Tr. 1647).

Defense counsel objected to the second remark on the basis that "the case is being tried to first determine guilt or innocence." (Tr. 1647). The trial court overruled the objection. (Id.) Later, the prosecutor stated:

> But you have the option of saying not guilty. It will be the biggest mistake of your life, but you have that option. (Tr. 1665).

The statements at issue made during the rebuttal closing argument are:

> "Come on. All these coincidences you can't believe. It's nonsense. If you don't believe the state's case here, you twelve people will never convict anybody." (Tr. 1710).

Defense counsel objected to this argument on the grounds that it was "totally improper to give that kind of threat to the jury." (Tr. 1710). The trial court sustained the objection, and on defense counsel's request struck the comment and instructed the jury to disregard it. (Id.) The prosecutor also stated:

> "And, yet, I stand here afraid, afraid that because Doris Black is so good and because you people may get confused . . . If you do, then a hit man goes free." (Tr. 1713).

Defense counsel objected to this argument on the grounds that it was a threat to the jury, contrary to the trial court's instructions, and was "just to elicit shock." (Tr. 1713). The trial court overruled the objection. (Tr. 1714). Finally, the

prosecutor stated:

> "But in order for you to let him go, you've got to believe that all this perjury was involved, that I was part of it--" (Tr. 1721).

Defense counsel objected on the grounds that this argument was improper, as the jury did not have to believe that the prosecutor was part of a conspiracy to commit perjury in order to acquit the petitioner. (Tr. 1721). The trial court overruled the objection. (Id.) Defense counsel then moved for a mistrial, which the trial court denied. (Tr. 1722).

None of these six statements by the prosecutor were presented to the Missouri Supreme Court. As a result, Claims 2.B. and 2.C. are procedurally defaulted and the Court's consideration of the claims is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of Claims 2.B. and 2.C. is appropriate.

Moreover, if the Court were to reach the merits of the claims, it would conclude plaintiff is not entitled to relief. In Darden, the Supreme Court examined several factors in determining whether prosecutorial misconduct at trial was so egregious that it required a new trial as a matter of constitutional law: (1) whether the prosecutor's statement manipulated or misstated the evidence; (2) whether the remarks implicated specific rights of the accused such as the right to counsel or the right to remain silent; (3) whether the defense invited the response; (4) instructions given by the trial court; (5) the weight of the evidence against the defendant; and (6) the defendant's opportunity to rebut. Darden, 477 U.S. at 181-82.

The prosecutor's statements did not misstate the evidence or implicate specific rights of the petitioner. Some of the prosecutor's statements were in response to defense counsel's attacks on the State's evidence. The trial court sustained some of defense counsel's objections to the prosecutor's statements, and instructed the jury that arguments of counsel were not evidence in the case. (Instruction No. 19, L.F. at 133.) There was significant evidence against petitioner, including the eyewitness testimony of several witnesses, albeit only with respect to his general build and clothing; testimony concerning petitioner's apprehension while running barefoot in Pasadena Hills far from his home, but not far from where Daryl Shurn's car was wrecked; testimony by Police Officer Gardiner that petitioner was the same person he saw run from Shurn's wrecked car; uncontroverted testimony that petitioner's car was parked in the Mansion Hills apartment parking lot; and testimony that petitioner's keys were found in Daryl Shurn's wrecked car after the accident. Assuming the prosecutor improperly injected his personal opinion into closing argument, petitioner has not shown that the improper argument rendered his trial fundamentally unfair. The Court cannot conclude that but for the prosecutor's improper remarks, the outcome of the guilt phase would have been different, or that the prosecutor's statements in closing argument of the guilt phase "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181.

b. Claims 2.I.- 2.L.: Attacks on Defense Counsel--Fabrication of Evidence.

In Claims 2.I., 2.J., 2.K. and 2.L., petitioner argues that the prosecutor violated his due process rights by arguing that defense counsel knowingly introduced perjured testimony and fabricated petitioner's defense, and by improperly injecting the prosecutor's personal belief that defense counsel was involved with obtaining perjured testimony:

And now; of course, Mr. Weaver is here lying to you and telling you that he didn't do it and wanting you to believe that and hoping through the assistance of Ms. Black -- who is just about as capable of a defense attorney as you're going to find in these cases -- that enough confusion, enough smokescreens, enough whatever has been created to put in your mind some reasonable doubt as to his guilt. (Tr. 1645).

. . . . .

But as the case unraveled, I'm sitting there listening to all this and I've got my back to you people, and I don't know what impact the things elicited by Ms. Black may have had on you. I don't know whether you think these little mole hills that Ms. Black talked about are now mountains in your mind or if they are still mole hills. I don't know whether the smokescreen she's creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see it's nothing more than a smokescreen and you're waiting to get to the jury room to render a verdict of guilty.

But at this point, you've heard all the evidence you're going to hear. But that's all you heard for four or five days was a harangue to try to create confusion out of nothing, to try to get a police officer to make one little mistake which then makes him a liar, one inconsistency, whatever, and they are liars; they are perjurers. Just create whatever smokescreen you have. So the last day or two, I've been concerned what impact this is having on the jury?

> Well, last night when I'm trying to decide exactly what I'm going to say to you and I cleared all the smoke away and all the harangue and all the noise, you're left with nothing more than the facts. (Tr. 1648-49).
>
> . . . . .
>
> And by the way, I'm not even convinced the girl was having an affair with him. I think they found a young girl and she may be willing to come in here and be the hero this week. Ms. Black talked about her being so embarrassed, how difficult it was for her to testify. She came back the next day and sat in the first row and for three or four more days. She's the star of the show. She is the heroin[e]. (Tr. 1665).

With respect to these statements, the Missouri Supreme Court observed that prosecutors' comments to the effect that a defendant or a defense witness were lying have repeatedly been upheld, and a prosecutor may comment on the evidence and the credibility of the witnesses. The state court found the prosecutor's remarks in this case to be well within the range of proper comment. The Missouri Supreme Court stated that direct arguments defense counsel has suborned perjury or fabricated evidence have been held to be prejudicial error, but concluded the prosecutor in this case did not go that far. The state court concluded the prosecutor's arguments that defense counsel had erected a "smokescreen" fell short of accusing counsel of suborning perjury, and at most were "near error, which by definition, is not error." Weaver, 912 S.W.2d at 513-14.

Prosecutors should refrain from personal attacks on defense counsel. United States v. O'Connell, 841 F.2d 1408, 1428 (8th Cir.), cert. denied, 488 U.S. 1011 (1988).

Nonetheless, "Prosecutorial misconduct does not warrant federal habeas relief unless the misconduct infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts v. Bowersox, 137 F.3d 1062, 1066 (8th Cir. 1988) (citing Darden, 477 U.S. at 181), cert. denied, 525 U.S. 1073 (1999). "Improper prosecutorial remarks violate due process when there is a reasonable probability the remarks affected the trial's outcome." Id. To decide the effect of a prosecutor's remarks, a court examines the totality of the circumstances and the remarks within the context of the trial. United States v. Young, 470 U.S. at 11-12. Comments similar to those made by the prosecutor in this case have been held not to warrant habeas relief or require a new trial. See, e.g., Roberts, 137 F.3d at 1066 (prosecutor's argument which questioned defense counsel's honesty several times and referred to the attorney's failure to present certain evidence, even if improper, did not violate due process); United States v. Finch, 16 F.3d 228, 232 (8th Cir. 1994) (direct appeal; government's argument that a witness was telling the truth and defense counsel was trying to mislead the jury were not impermissible).

Based on the foregoing authority, and after examining the totality of the circumstances including the weight of the evidence against petitioner, the Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 2.I., 2.J., 2.K. and 2.L.

2. Penalty Phase.

In Claims 2.D., 2.E., 2.F., 2.G., 2.H. and 2.M., petitioner objects to a number of statements by the prosecutor during the penalty phase closing argument and rebuttal argument as violating his due process rights under the Fourteenth Amendment and his rights under the Sixth and Eighth Amendments. Petitioner argues that the prosecutor's remarks impermissibly injected his personal opinions and beliefs, threatened the jury, and appealed to the jurors' fears and emotions. Petitioner also argues that the prosecutor improperly argued irrelevant and immaterial issues intended to inflame the jury, which were not based on the evidence.

In the Eighth Circuit, there is a well-established analysis for determining whether a prosecutor's improper closing argument during the penalty phase rises to the level of a due process violation. Miller v. Lockhart, 65 F.3d 676, 683 (8th Cir. 1995). A court should:

> (1) measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his argument to minimize the prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances.

Antwine, 54 F.3d at 1363. As previously stated, the Eighth Circuit has observed "it would seem that there should be a more searching review of the penalty phase as the Eighth Amendment is implicated." Copeland, 232 F.3d at 974 n.2. The Eighth Circuit has vacated a death sentence based on improper closing argument during the penalty phase in four recent cases. See Copeland, 232 F.3d 969; Shurn, 177 F.3d 662 ; Antwine, 54

F.3d 1357; and Newlon, 885 F.2d 1328.[5]

a. Claim 2.D.

The challenged statements in Claim 2.D. began with the following:

> Well if this isn't it, what would it be? If this isn't a case where you can impose a death penalty, where people would go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? So if you were being honest to [sic] me when you said that, then that has to be the case. (Tr. 1761).

Defense counsel objected to the argument as improper, arguing that the prosecutor's statement was threatening to the jury and was intended to impose fear and intimidation on the jury in order to get it to return a verdict of death. Defense counsel asked the trial court to sustain her objection and instruct the jury

---

[5]This Court notes that the prosecutor in the instant case, George "Buzz" Westfall, was also the prosecutor in the Shurn and Newlon cases. Mr. Westfall testified at the Rule 29.15 motion hearing that he tried three death penalty cases while he was the prosecuting attorney: Newlon, Shurn, and Weaver. Resp. Ex. D, Tr. on Appeal, Vol. 1, p. 115. The Eighth Circuit's decision in Newlon, which granted habeas corpus relief partly because Mr. Westfall's closing argument was found to violate due process, was issued approximately five weeks prior to the trial of the Weaver case. Mr. Westfall testified at the Rule 29.15 motion hearing that he was aware prior to the trial that Newlon had vacated Newlon's sentence of death in part because of his remarks in closing argument. Resp. Ex. D, pp. 154-55.

to disregard the statement, but the trial court refused. (Tr. 1762).

> The prosecutor continued:
> If this isn't a case that calls for the death penalty, I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said you would prefer it, that you would favor it in the right case. This is the right case. (Tr. 1762).

Subsequently, the prosecutor stated:

> I mean if this isn't the case for the death penalty, then there's no case you'll do it. (Tr. 1765).

With respect to these statements, the Missouri Supreme Court observed that a prosecutor's argument may make reasonable inferences from the evidence, even if the inferences do not necessarily seem warranted. Weaver, 912 S.W.2d at 512. The state court said a prosecuting attorney in argument may indicate his opinion that the accused is guilty, where it is apparent the opinion is based on the evidence in the case. Id. The state supreme court stated the prosecutor's statements in this case "may seem flamboyant, if not somewhat abrasive," but given the eyewitness testimony about how the murder was carried out, the court concluded it was fair for the prosecutor to point out the strength of the state's case. The court concluded that the prosecutor's use of rhetorical questions was, "for the most part, a fair comment on the strength of the case." Weaver, 912 S.W.2d at 513.

"An attorney's personal opinions are irrelevant to the . . . jury's task." Newlon v. Armontrout, 693 F. Supp. 799, 804 (W.D. Mo. 1988) (quoting Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir. 1985) (en banc)), aff'd, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990). Here, the prosecutor

repeatedly offered his opinion that the death penalty was the only appropriate penalty, and that if the jurors had been honest with him in responding to voir dire questioning, the jury must return a verdict of death. This line of argument was improper because it was intended to intimidate the jury into returning a verdict of death. "Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse plays upon the jury's susceptibility to credit the prosecutor's viewpoint." Brooks, 762 F.2d at 1410.

"The prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." Brooks, 762 F.2d at 1399. As a result, a prosecutor's misconduct may be grounds for reversal in part because of a "systemic belief that a prosecutor, while an advocate, is also a public servant 'whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). In Berger, the United States Supreme Court stated it is as much a prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88. The Supreme Court discussed the tendency for the prosecutor to have an excessive influence on the jury:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

A review of the record shows that defense counsel chose to focus her penalty phase argument on the possibility that the jury had made an error in its guilt phase verdict; that if it were later determined an error had been made, it could be corrected if petitioner were in prison, but not if he had been executed; that the jurors could certainly consider the penalty of life in prison, even for this type of killing; that the jury should choose life because they might be mistaken, because of the mitigating circumstances that existed, including petitioner's children and ill mother, because of petitioner's conduct during incarceration, and because of the good things petitioner's friends had said about him; and that life in prison would be a terrible punishment, "like a living death," so that the jury would have "sent [its] message" and "done [its] job." Tr. on Appeal, Vol V., pp. 1769-76. Thus, defense counsel chose not to devote her argument to rebutting or challenging the prosecutor's statements to which she had earlier objected. According, defense counsel's argument did not serve to minimize any prejudice that arose from the prosecutor's statements. As previously stated, the trial court instructed the jury that statements of counsel are not evidence, and that they should be guided by the evidence.

Considering all of the evidence and the record as a whole, the Court cannot conclude that these improper prosecutorial remarks alone affected the trial's outcome, or "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066 (citing Darden, 477 U.S. at 181). Thus, the Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

b. Claims 2.G. and 2.H.

In Claims 2.G. and 2.H., petitioner challenges the following statements of the prosecutor as improperly arguing irrelevant and immaterial issues:

> William Weaver ran out of bullets. Think back to the evidence. I'm sure you discussed it yesterday. But when you discuss his fate, think about the evidence. He ran out of bullets and Charles Taylor was still alive. So when they go back, he's reloading. All six spent casings are on the floorboard right where he was and he's reloading while Daryl is driving and they stop and he goes back and shoots him some more. Then I'm going to tell you that he was out of bullets, because if he hadn't been, Officer Crain would have been dead because he would have kept the gun on him instead of pitching it out of the car. (Tr. 1762-63).

Defense counsel objected to this argument as irrelevant and prejudicial on the grounds that there was no evidence petitioner had threatened Officer Crain or that he had a gun when he saw Officer Crain. (Tr. 1763). The trial court overruled the objection and the prosecutor continued:

> If he had still had the gun and still had bullets, do you think he would have sure surrendered as meek as a lamb? I mean, of course, he wouldn't have surrendered. What if Jean Henson would have been jogging a little bit later than she was and coming around the woods or the clearing at the time of the murder and he still had some bullets. You think she would be alive? (Tr. 1763).

Defense counsel objected to this argument as improper on the grounds that it was intended to invoke sympathy and outrage from the jury, and that there was no evidence the person who killed Taylor ever tried to kill Jean Henson. The trial court overruled the objection. (Tr. 1763).

The Missouri Supreme Court concluded the prosecutor's argument that petitioner would have shot more people if he had not run out of bullets was reasonable as the evidence presented permitted an inference that petitioner "had a high propensity for violent conduct in the future." Weaver, 912 S.W.2d at 514.

This Court concludes these arguments are not a reasonable inference based on the evidence presented in the record. An argument that more people could have been killed could be made in any case where criminal violence has resulted in death. The arguments were intended to play on the jurors' emotions and inflame them. "When the sovereign takes the life of one of its citizens, it is vital that 'any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" Newlon, 693 F. Supp. at 806 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

Nonetheless, considering all of the evidence and the record as a whole, the Court cannot conclude that these improper remarks alone affected the trial's outcome, or "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066 (citing Darden, 477 U.S. at 181). Thus, the Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

c. Claims 2.E. and 2.F.

In Claims 2.E. and 2.F., petitioner argues that the

prosecutor's statements impermissibly injected his personal beliefs and objections, threatened the jury, and appealed to jurors' fears and emotions:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that, but that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty. (Tr. 1778).

Defense counsel objected to this argument as improper and as a misstatement of the law. The trial court sustained the objection and granted defense counsel's request to instruct the jury to disregard the statement. (Tr. 1778).

> Later, the prosecutor stated:
> Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But

> tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do. (Tr. 1782-83).

Defense counsel objected that the prosecutor's argument was improper and was intended to inflame and prejudice the jury. The trial court overruled the objection. (Tr. 1782-83).

Both of these arguments were presented to the Missouri Supreme Court, but that court did not discuss them specifically. The state court distinguished the prosecutor's remarks in this case from more egregious remarks in other cases which did render the trial fundamentally unfair, such as a prosecutor's comment that he would not bring a charge if the defendant were innocent, State v. Evans, 820 S.W.2d 545, 547 (Mo. App. E.D. 1991), or a prosecutor's comment that a murder was so brutal, it was worse than all other murders in the county, State v. Storey, 901 S.W.2d 886 (Mo. 1995) (en banc). The Missouri Supreme Court also distinguished this case from Newlon v. Armontrout, 885 F.2d 1328, on the basis that the prosecutor there expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant. Weaver, 912 S.W.2d at 513. The court decided that although the Eighth Circuit had concluded the totality of the circumstances rendered the penalty phase in Newlon fundamentally unfair, the arguments in this case did not rise to that level. Id.

The prosecutor's statement that if the jury did not return a sentence of death there was no point in having the death penalty, was improper for the same reasons discussed above with respect to the similar statements made during the initial penalty phase arguments. This constituted a statement of the

prosecutor's expression of personal belief in the propriety of the death sentence for petitioner, and sought to intimidate the jury into returning a verdict of death. The effect of the trial court's instruction to the jury to disregard the statement is difficult to ascertain from the record, particularly as the court did not sustain defense counsel's objection to similar statements made by the prosecutor earlier.

The second statement equates the jury's task of reaching a penalty verdict with the duties of soldiers during war, and urges them to gather the courage necessary to do their duty of sentencing the petitioner to death. Aspects of this statement, which was not addressed by the Missouri Supreme Court, are clearly improper as seeking to appeal to the jurors' passions and prejudices. The statement was "calculated to remove reason and responsibility from the sentencing process."[6] Newlon, 885

---

[6]The Court includes the following quotation from the record solely to show that the prosecutor's intent in making this argument was to inflame the jurors' passions and disengage their sense of rational, reasoned deliberation. This quotation was not included in the record before the Missouri Supreme Court, and does not figure into this Court's decision. After the trial court overruled counsel's objection to the prosecutor's argument concerning Patton, the prosecutor continued and concluded his rebuttal argument as follows:

> He said, "You'll know what to do." Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with your brain and you made the right decision. Today, you've got to reach down into your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we

F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808). The Constitution requires juries to impose the death penalty in a rational, deliberate manner. Shurn, 177 F.3d at 668 (Wollman, J., concurring).

The prosecutor's statement analogizing imposition of the death penalty to killing in war was permissible to the extent it "implied that imposing death, while difficult, is at times sanctioned by the state because of compelling reasons (national security or deterring crime)." Brooks, 762 F.2d at 1412. The prosecutor's statement was improper in that the role of a capital sentencing jury under Missouri law cannot be analogized to the role of a soldier ordered to kill the enemy, as the jury is bound to exercise broad discretion and independent judgment and reason in reaching its verdict. See id.; Newlon, 693 F. Supp. at 806. "The main thrust of death penalty jurisprudence since Furman v. Georgia, 408 U.S. 238 (1972), has been the need for guided discretion in the sentencing body's individualized consideration of the capital defendant. See, e.g., Zant v. Stephens, [462 U.S.862, 879 (1983)]. Conceiving of jurors as soldiers undermines the crucial discretionary element required by the Eighth Amendment." Brooks, 762 F.2d at 1413.

The Court having carefully considered the record as a whole concludes that this argument, permitted by the trial court over defense counsel's objection, "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066 (citing Darden, 477 U.S. at 181). Although the statement occurred during final rebuttal, "a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is

---

sentence you to die. You know what to do. Please, have the courage to do it. Thank you.

Tr. on Appeal, Vol. V., p. 1783.

mandated." United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996) (internal punctuation and citation omitted). The jury in this case was subjected to a "relentless, focused, uncorrected argument . . . calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808).

Thus, the Court concludes plaintiff has established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. This aspect of the prosecutor's closing argument so clearly violated petitioner's due process rights by removing reason and responsibility from the sentencing process and inflaming passion and prejudice that it was unreasonable for the Missouri Supreme Court to conclude there was no error.[7]

d. Claim 2.M.

Petitioner objects to the prosecutor's arguments during the penalty phase (1) that the death sentence was appropriate due to petitioner's connection to the Shurn family and their drug operation (Tr. 1760, 1776, 1777), on the basis there was no evidence petitioner had knowledge of the Shurn family's drug trade; (2) that the death penalty is a deterrent (Tr.1778-79), as being without factual basis; and (3) concerning the "war on drugs" (Tr. 1759, 1768, 1776-77, 1779, 1781), as being intended to appeal to the jury's passions and inflame them.

---

[7]The Court notes the Missouri Supreme Court did not find that Mr. Westfall's closing arguments violated due process principles in either Newlon or Shurn, although the Eighth Circuit Court of Appeals did. See State v. Newlon, 627 S.W.2d 606 (Mo. 1982) (en banc); State v. Shurn, 866 S.W.2d 447 (Mo. 1993) (en banc).

The Court will not consider petitioner's point in Claim 2.M. concerning the prosecutor's argument linking him to the Shurn family and its drug trade, because this point was not raised before the Missouri Supreme Court, and as a result is procedurally defaulted. See LaRette, 44 F.3d 681.

With respect to the death-penalty-as-deterrent argument, the prosecutor stated during rebuttal penalty phase closing argument:

> We can't bring Charles Taylor back to life, but we can save other lives. The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this. If some of those people really though they faced the prospect of a death penalty, some of them wouldn't do it.
>
> How do I ever prove to you with statistics how many lives were saved? I mean the old analogy is a lighthouse. I don't know how many shipwrecks a lighthouse prevents because we don't have statistics on those that don't occur. If it doesn't occur, it doesn't go down on paper. Yet, many shipwrecks are avoided because of a lighthouse. If a death penalty can save a life, we don't know because the murder won't occur. We don't have statistics of the innocent victims that might be saved instead of being killed at the hands of a convicted murderer. (Tr. 1778-79).

The Missouri Supreme Court found this argument to be reasonable, based on the fact that the crime had been planned for the purpose of killing a witness, and to advance "what was

apparently a very violent drug enterprise[.]" Weaver, 912 S.W.2d at 514. The court concluded this evidence permitted an inference that petitioner had a high propensity for violent conduct in the future. Id.

The Supreme Court has recognized the inconclusive nature of scholarly debate on the deterrent effect of the death penalty, and has stated that while capital punishment has "little or no deterrent effect" on some murderers, it "undoubtedly" is a significant deterrent for others. Gregg v. Georgia, 428 U.S. 153, 185-86 (1976). Therefore, the prosecutor's argument urging the jury to consider the deterrent effect of the death penalty was not improper, and it was not necessary that the prosecutor provide evidence to establish a link between the death penalty and deterrence. See Brooks, 762 F.2d at 1409.

The Court concludes petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

With respect to the "war on drugs" arguments, the prosecutor stated during the initial penalty phase closing argument:

> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

> Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shum? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to **kill him now**. (Tr. 1759) (Emphasis added).

The prosecutor later stated:

> This case – I guess it's one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.
>
> When it comes time after Ms. Black talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business. (Tr. 1768).

During rebuttal penalty phase argument, the prosecutor stated:

> And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message

instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're guilty, we're going to give you life in prison? That's not the right message. (Tr. 1776).

. . . . .

The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important then William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that. (Tr. 1777).

. . . . .

You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in

> exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do. (Tr. 1779).
>
> . . . . .
>
> It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't. (Tr. 1781-82).

Defense counsel objected to the last argument as improper because it was personalizing the case. The trial court sustained the objection and granted defense counsel's request to instruct the jury to disregard the last comment. (Tr. 1782).

The Missouri Supreme Court concluded that while the remarks concerning the prosecutor's position as prosecuting attorney of the county were improper, defense counsel's objections were properly sustained, and the curative instruction given to the jury to disregard the remarks was sufficient to avoid depriving the defendant of a fair trial. Although the "war on drugs" argument was presented to the Missouri Supreme Court, that court did not specifically address the issue. The court stated, "Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase," Weaver, 912 S.W.2d at 514, and discussed several points, but did not devote any discussion to the "war on drugs" point. The Court will address the merits of this claim. See Coleman, 501 U.S. at 732-35 (in the absence of a clear and express statement declaring otherwise, an ambiguous state court decision is presumed to be made on the basis of the court's belief that federal law required such decision, thus permitting

the federal habeas court to address the petition).

It is clear that a prosecutor may ask jurors to act as the "conscience of the community" as long as the comments are not intended to inflame the passions of the jury. United States v. Koon, 34 F.3d 1416, 1444 (9th Cir. 1994), aff'd in part and rev'd in part, 518 U.S. 81 (1996); United States v. Sanchez-Sotelo, 8 F.3d 202, 211 (5th Cir. 1993), cert. denied, 511 U.S. 1023 (1994); United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992). Prosecutors in drug cases "may stress to the jury the seriousness of drug charges and comment on the gravity of this county's drug problem." United States v. Dominguez, 835 F.2d 694, 700 (7th Cir. 1987), cert. denied, 485 U.S. 965 (1988). Prosecutors may not, however, argue that a jury should convict to make a statement against crime in general or to deter future crime as a matter separate and apart from the issue of the defendant's guilt. This kind of argument is improper because "[t]he amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985). Explicit references to the jury "making a statement" are patently inappropriate because they invite the jury to satisfy its passions by looking beyond the evidence before it in rendering a verdict. See, e.g., Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993) (vacating conviction where the prosecutor throughout closing argument "urged the jury to view this case as a battle in the war against drugs, and the defendants as enemy soldiers"); Johnson, 968 F.2d at 771 (Eighth Circuit held improper the prosecutor's exhorting jury in drug case to act as a "bulwark against . . . putting this poison on the streets"); United States v. Solivan, 937 F.2d 1146, 1148 (6th Cir. 1991) (holding improper the prosecutor's comment, "And I'm asking you to tell her and all of the other drug dealers like her that we don't want that stuff in Northern Kentucky . . .").

In this case, the prosecutor's comments clearly and

repeatedly crossed the line of propriety and were unduly inflammatory and improper. The prosecutor stated on numerous occasions that the jury should look beyond the petitioner, and told them, "This isn't personal. This is business." The gist of the prosecutor's argument is captured in the following quotation:

> [T]his is far more important then William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community.

Tr. on Appeal, Vol. V., p. 1777.

This type of argument is highly improper because it seeks death for petitioner in order to send a message to the broad society of drug dealers and murderers not only in St. Louis, but the entire world. Petitioner thus bears the burden of all drug dealers and murderers. This undermines the crucial requirement that sentencing considerations be individualized by introducing the improper suggestion that petitioner be killed merely to send a message to others. See Brooks, 762 F.2d at 1413.

In addition, interspersed with the prosecutor's "send a message" arguments were two other highly improper arguments. First, the prosecutor told the jury "it's right to kill him now." (Tr. 1759) The Eighth Circuit found a similar statement to be prejudicial and improper in both Newlon, 885 F.2d at 1335, and Shurn, 177 F.3d at 667. Judge Wollman, concurring in the Shurn opinion, stated:

> To me, the statements "[K]ill him now. Kill him now," and "Kill Daryl Shurn" are an appeal to blood lust and mob justice rather than a call

> for the jury to return a sentence of death after calm, reasoned deliberation. This strident appeal to primitive emotion could not have done other than to touch the raw nerve of vengeance that lies within us all. The resulting diminution of the jury's sense of responsibility under mined the Eighth Amendment's heightened need for the responsible and reliable exercise of sentencing discretion in capital cases.

Shurn, 177 F.3d at 668. As the Supreme Court has instructed, the constitution requires that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. at 358.

Second, the prosecutor emphasized his position of authority by stating that he was the "prosecuting attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." Tr. on Appeal, Vol. V., pp. 1781-82. It is improper for a prosecutor to tell a jury that an authoritative source has deemed the death penalty appropriate in a particular case, because this creates a danger the jury will defer to an expert's legal judgment in its choice of penalty. See Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); see also Brooks, 762 F.2d at 1410 ("Because the jury is empowered to exercise its discretion in determining punishment, it is wrong for the prosecutor to undermine that discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse plays upon the jury's susceptibility to credit the prosecutor's viewpoint.")

The Court having carefully considered the record as a whole, concludes that the "war on drugs" arguments "infected the trial with enough unfairness to render [petitioner's] conviction a denial of due process." Roberts, 137 F.3d at 1066

(citing Darden, 477 U.S. at 181). The jury in this case was subjected to a "relentless, focused, uncorrected argument . . . calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338 (quoting Newlon, 693 F. Supp. at 808).

Thus, the Court concludes plaintiff has established that the decision of the Missouri Supreme Court, which implicitly found the "war on drugs" argument constitutionally permissible, involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. This aspect of the prosecutor's closing argument clearly violated petitioner's due process rights by removing reason and responsibility from the sentencing process, inflaming passion and prejudice, and drawing the jury's attention away from the individualized decision it was required to make with respect to petitioner. As a result, it was unreasonable for the Missouri Supreme Court to conclude there was no constitutional error.

3. Totality of the Circumstances.

In order to decide the effect of the prosecutor's improper remarks, the Court now examines the totality of the circumstances and the remarks within the context of the entire penalty phase. See United States v. Young, 470 U.S. at 11-12. During the penalty phase, the prosecutor argued his personal opinions, improperly urged the jury to disregard the individual circumstances of the petitioner and instead to send a message to all drug dealers and murderers everywhere, repeatedly appealed to the jurors' fears and emotions, told them to kill petitioner, emphasized his position of authority, analogized the role of the capital sentencing jury to that of soldiers carrying out duties in wartime, and argued irrelevant and immaterial issues in an attempt to inflame the jury's passions and prejudices. The arguments in this case bear many similarities to the arguments in Newlon and Shurn, which the Eighth Circuit found to violate

the due process rights of the petitioners in those cases.

The majority of defense counsel's objections to the improper arguments were overruled. The prosecutor's remarks during the rebuttal penalty phase argument were not invited by defense counsel, and counsel had no opportunity to respond to these arguments except by objection. The prosecutor's improper remarks were so many and so permeated the penalty phase arguments that "[t]he improper argument would have had a significant prejudicial effect on the jurors[,]" Copeland, 232 F.3d at 975, even though the jury was instructed that arguments of counsel are not evidence. The prosecutor's remarks were not isolated, but rather "formed the crux of the prosecutor's argument for imposing the death penalty." Copeland, 232 F.3d at 975. The evidence against petitioner in this case was strong but not overwhelming, as defense counsel did a creditable job of calling into question the eyewitnesses' descriptions of the shooter, in particular focusing on the discrepancy between the color of the shooter's clothing and the color of petitioner's clothing. Several mitigating circumstances were submitted for the jury's consideration. The jury agreed on punishment after five hours of deliberation, but did so only after being subjected to a "relentless, focused, uncorrected argument . . . calculated to remove reason and responsibility from the sentencing process." Newlon, 885 F.2d at 1338.

Applying the appropriate standard of review to the instant case, the Court concludes that the prosecutor's penalty phase closing argument so infected the trial with unfairness as to make the resulting sentence of death a denial of due process. It was unreasonable for the Missouri Supreme Court to conclude, in light of Supreme Court precedent, that the argument did not result in a deprivation of due process. Copeland, 232 F.3d at 975. For the foregoing reasons, the Court concludes petitioner has established that the decision of the Missouri Supreme Court with respect to the totality of the penalty phase closing argument involved an unreasonable

application of clearly established federal law as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be granted with respect to the foregoing aspects of Claim Two concerning the penalty phase.

B. Claim Three - Prosecuting Attorney's Investigator Posing as Juror.

Petitioner argues that his conviction occurred in violation of his Sixth, Eighth and Fourteenth Amendment rights as a result of an investigator for the prosecuting attorney's office posing as a juror and mingling with the jurors for several days. Petitioner states that during jury selection, the investigator wore a juror badge and provided "security" because he believed that individuals coming into the courtroom might be concealing guns. The investigator's concern was conveyed to the prosecuting attorney. The trial court was then advised, and announced in open court that anyone returning to the courtroom would be searched. Petitioner asserts that the mere fact an investigator for the prosecuting attorney's office placed himself in a position which allowed him to mingle with jurors on a death penalty case for several days is misconduct which requires reversal due to structural error.

Petitioner asserts that one juror who served on the case, Mr. Smith, knew the investigator, as they had worked together at a medical center. The juror also knew the investigator worked for the prosecuting attorney's office. There was evidence Juror Smith approached the investigator and spoke to him. Petitioner asserts that the juror's actions combined with the investigator's conduct created an atmosphere of undue influence, and that it is doubtful the juror gave due and fair consideration to the facts as a result of his acquaintance with the investigator, and the investigator's presence to provide "security."

Petitioner asserts the trial court erred and violated his Fourteenth Amendment due process rights by refusing to conduct a hearing into the investigator's misconduct, when petitioner's counsel requested a hearing prior to the guilty phase closing argument and again prior to the penalty phase arguments. Petitioner also asserts that the State has not met its burden to show that prejudice did not result from the contact between the investigator and the juror, citing United States v. Hall, 85 F.3d 367, 371 (8th Cir. 1996).

Petitioner presented this issue to the Missouri Supreme Court and the issue was resolved by that Court as follows:

> In his third point, Weaver complains that the trial court erred in failing to grant either a hearing before the verdict or a new trial after it was disclosed that the state's investigator, Lawrence Freeman, posed as a juror, wore a juror button, and mingled with the venire panel during the first day of jury selection either while the members of the venire panel were in the hallway outside the courtroom or in a jury assembly area on a separate floor.
>
> During the early stages of the trial, Freeman became alarmed by a group of persons he believed to be members of the Weaver family who were standing near the courtroom where jury selection was taking place. According to Freeman, both men and women were carrying Gucci bags or purses capable of concealing weapons. Freeman responded by obtaining a juror badge from one of the court's staff in order to "provide security." While wearing the juror badge, Freeman was watching the persons near the courtroom door when he was approached by Mr. Smith, one of those who was ultimately

selected to serve as a juror. Smith spoke to Freeman but was told by Freeman that he could not talk because Freeman had been called to jury duty. Freeman claimed to have gotten word to the prosecutor about the bags, who informed the judge. When the judge announced that all persons entering the courtroom would be searched, the persons with the bags left.

Defense counsel observed Smith and Freeman talking, knew Freeman was an investigator for the prosecutor, and also knew that Smith was a juror. However, she did not bring her information to the attention of the trial judge prior to the trial by moving to strike Smith for cause and did not use a peremptory strike to remove Smith from the jury. Defense counsel first brought the matter to the attention of the trial judge during the instructions conference. The trial judge was concerned that an interrogation of the jurors at that time about what had occurred before the trial might be disruptive and so did not take immediate action. After the jury had completed its deliberations, the trial judge inquired before the jurors were discharged if any of them had contact with Freeman during the trial or whether Freeman had attempted to make any effort to discuss with any of them anything regarding the case. Juror Smith replied, "I know him. I spoke to him before the trial." There is nothing in the record to indicate that Freeman spoke with Smith about the subject matter of the trial.

Without a doubt, the court employee who gave the juror button to Freeman should be reprimanded, and Freeman's conduct was

> thoughtless, if not bizarre. Trial judges, lawyers, and those who are assigned to provide security and look after the needs of jurors while they are being selected, hearing evidence or deliberating must constantly guard against any outside influence or distraction.
>
> Nevertheless, Freeman's actions do not rise to the level of *State v. Post*, 804 S.W.2d 862 (Mo.App. 1991), where a deputy sheriff and a police officer not assigned to the case mingled with jurors at their hotel rooms, and one deputy and a juror engaged in sexual improprieties such that the jury had been so distracted that it could not give "due and fair consideration of the facts." *Id.* at 862-63.
>
> Where misconduct involving jurors during the progress of the trial is alleged, the verdict will be set aside unless the state affirmatively shows that the jurors were not subject to improper influences. *State v. Edmondson*, 461 S.W.2d 713, 723 (Mo. 1971). In this case, where the facts are fully disclosed and they conclusively demonstrate an absence of prejudice to the defendant and an absence of any improper influence on the juror in question there is no prejudice. Under these circumstances, Weaver is not entitled to a new trial.

Resp. Ex. G at 13-14; Weaver, 912 S.W.2d at 511-12.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he

can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury. Private communications between an outside party and a juror raise Sixth Amendment concerns. See Parker v. Gladden, 385 U.S. 363, 364 (1966) (per curiam). In the direct appeal context, the Supreme Court has stated that "any private communication [or] contact . . . with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." Remmer v. United States, 347 U.S. 227, 229 (1954); see United States v. Caldwell, 83 F.3d 954, 956 (8th Cir. 1996) (same). The Supreme Court has made clear, however, that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." Smith v. Phillips, 455 U.S. 209, 217 (1982). Instead, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Id.

The Eighth Circuit has stated that in the habeas context, Remmer does not establish a rule that any extrajudicial communication with a juror is presumed to deprive a criminal defendant of due process under the Fourteenth Amendment. Boykin v. Leapley, 28 F.3d 788, 790 (8th Cir. 1994); see also Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002) (applying Remmer in habeas context; holding that when a habeas

petitioner bases a juror bias claim on improper communication between a juror and a nonjuror, "he must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict . . . . [T]he government [then] bears the burden of demonstrating the absence of prejudice."), cert. denied, 123 S. Ct. 890 (2003).

In a § 2254 habeas proceeding, "a federal court's review of alleged due process violations stemming from a state court conviction is narrow." Hamilton v. Nix, 809 F.2d 463, 470 (8th Cir.), cert. denied, 483 U.S. 1023 (1987). Different standards and burdens of proof apply when federal courts consider direct appeal claims in federal criminal trials and habeas corpus review of state criminal convictions. Id., n.4. "Thus, not every trial error that might result in reversal of a federal conviction on direct appeal would mandate the same result in a § 2254 review of a state court conviction, where we may consider only errors of constitutional magnitude." Id.[8]

The Missouri Supreme Court found there was no evidence in the record to show that the investigator had spoken with Juror Smith about the subject matter of the case. The Court concluded that while the investigator's conduct was improper, petitioner had not been prejudiced by it. The record shows that after the verdict was rendered, the trial judge inquired whether any of the jurors had been approached by Larry Freeman during the trial, and whether he had spoken to them. Juror Smith answered that he knew Freemen, and spoke

---

[8]The cases petitioner relies on are all direct criminal appeals, and as such, are not controlling. See Turner v. Louisiana, 379 U.S. 466 (1965); United States v. Hall, 85 F.3d 367, 371 (8th Cir. 1996); United States v. Caldwell, 83 F.3d 954 (8th Cir. 1996); United States v. Delaney, 732 F.2d 639, 642 (8th Cir. 1984).

to him before Smith had been selected as a juror and before the case began. Smith denied that he spoke to Freeman about the case. Tr., Vol. V, pp. 1786-87. Upon further questioning by petitioner's trial counsel, Juror Smith stated the conversation with Freeman consisted of only general topics: "Oh, just how you been doing and hadn't seen him since the last time I was here because I sometimes bring patients here and I run into him. Nothing concerning this." Id. at 1787.

The most petitioner can establish is that a conversation took place between the investigator, Freeman, and Juror Smith. Petitioner has not established either that the conversation concerned the trial, or that he was actually prejudiced. Where a habeas petitioner does not "establish this threshold condition," Remmer is inapplicable. O'Dell v. Armontrout, 878 F.2d 1076, 1080 (8th Cir. 1989), cert. denied, 493 U.S. 1037 (1990).

Petitioner has not established that the decision of the Missouri Supreme Court with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Lomholt, 2003 WL 1961035, *2. Moreover, the Court finds that the Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Kinder, 272 F.3d at 538. Therefore, petitioner's § 2254 petition for habeas corpus relief will be denied with respect to Claim Three.

C.-E. Claims Four, Five and Six - Brady Violation - Prosecutor's Failure to Disclose Agreement with Witness; Failure to Disclose Police Dispatch Tape; Failure to Disclose Description of Suspect.

Petitioner argues that his conviction occurred in violation of his Sixth, Eighth and Fourteenth Amendment and

due process rights because the prosecutor failed to disclose prior to trial the entire agreement between a State's witness, Robert "Dutch" Tabler, and the State and all circumstances that would affect the witness' credibility. Tabler testified at trial that petitioner admitted he was a "hit man" who along with Daryl Shurn had killed Charles Taylor because Taylor was a potential witness against one of Shurn's brothers, and that petitioner's defense at trial would be misidentification. Petitioner asserts that the following material impeachment information was not disclosed: (1) The prosecutor's original recommendation was a five-year sentence to be served consecutively to Tabler's parole revocation; (2) the original bond was set at $500,000 and the prosecutor filed a motion requesting the bond not be reduced or satisfied by a percentage or property bond; (3) the prosecutor informed Tabler's defense attorney that he would consider recommending early release in exchange for Tabler's testimony; and (4) Tabler had used a false name when arrested.

Petitioner presented this issue to the Missouri Supreme Court and the issue was resolved by that Court as follows:

> Weaver complains that the prosecutor failed to disclose all evidence favorable to the accused in response to his pretrial requests. The details of the state's response to Weaver's pretrial request were not included in the defendant's record filed on appeal. Neither was the response to the request presented at the post-conviction hearing. As best can be determined from the record, the following apparently was disclosed to defense counsel prior to trial:
>
> Tabler had been an inmate at the St. Louis County Correctional Facility for nine months prior to trial. Charges were pending against him for receiving stolen property and a misdemeanor

offense for possession of marijuana. His prior convictions included sodomy and oral copulation in 1980 in California, for which he was sentenced to three years in prison and served two, rape in 1983 in California, upon which he received a three-year sentence and served twenty-two months in prison, and a possession of methamphetamines conviction in 1986 in California for which Tabler received six months, four of which were served. It was also disclosed that Tabler was on parole from the state of California at the time of trial and was facing approximately a year and a half in prison there. Finally, it was disclosed that Tabler had made a deal with the state that in exchange for his testimony, the state would recommend a year for the receiving stolen property charge and six months for the possession of marijuana charge. The record also disclosed that Tabler had been charged as a persistent offender and was subject to an extended term of up to sixteen years but, because of the agreement made by the state, Tabler knew he could possibly get out of prison in five months time.

Weaver complains here that his constitutional right to a fair trial was violated because the state failed to disclose, in addition to the above, and (2) prior to the time Tabler came forward with the information about Weaver, he had been offered a five year sentence; (2) Tabler gave a false name when initially arrested; and (3) Tabler's bond had been set at $500,000.

The United States Supreme Court has held that the suppression by the prosecution of evidence favorable to an accused upon request violates

due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A due process violation occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676 (1985). A reasonable probability of a different outcome exists where the failure to disclose the evidence "undermines confidence in the outcome of the trial." *Id.* at 682. Considering the information that was disclosed by the state showing Tabler to have been convicted of multiple contemptible crimes and that his testimony was given in exchange for an extremely generous deal by the state makes the failure to disclose complained of by the defendant pale in comparison. The absence of the allegedly undisclosed evidence does not undermine confidence in the verdict. *See Kyles v. Whitley*, 514 U.S. 419, [434] (1995).

In any event, the defendant has failed to make clear what was and was not disclosed prior to trial and has put this Court in the position of having to parse through the record to determine exactly what was not disclosed. That alone would be sufficient to deny this claim without further discussion. However, because this is a capital case, the Court has carefully reviewed the record before resolving this point against Weaver.

See Respondent's Ex. G, p. 16; Weaver, 912 S.W.2d at 514-15.

Petitioner also argues that his conviction occurred in violation of his due process rights because the prosecutor failed to disclose prior to trial (1) a police emergency tape which contained a dispatched description of the suspects involved in the shooting along with a description of the vehicle; and (2) a handwritten notation on an arrest record in the prosecutor's file stating "defendant in maroon jacket." Petitioner asserts that the tape, which was never produced, was significant and material in that it contained a description of the suspect soon after the shooting. Petitioner asserts that the handwritten notation was material to his guilt and its materiality was increased because it supported the testimony of witness Conrad Wragg, who testified the shooting was done by a black male in a burgundy track suit.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> Defendant faults the prosecutor for allegedly failing to disclose a tape of a call to an emergency "911" number reporting that Taylor had been shot and giving a description of the suspect and for failing to disclose a notation on an arrest record in the prosecutor's file noting "D in maroon jacket." It is argued that the contents of the 911 tape and the notation on the police record "may have caused any description contained in the 911 tape to take on greater significance for purposes of additional discovery." The argument fails to disclose what significance the 911 tapes [sic] had to the defense. The argument also fails to disclose what relevance the notation "D in maroon jacket" might have had. To have any significance, the two matters require that a series of assumptions be made favorable to defendant's theory before a failure to disclose

> can be shown in any way to have been material or exculpatory. Here, Weaver has made no showing as to the materiality or exculpatory nature of the tape or the notation. A defendant is not entitled to information on the mere possibility that it might be helpful but must make some "plausible showing" how the information would have been material or favorable. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987). The mere possibility that these undisclosed items might have led to future discovery does not implicate a due process violation. *See State v. Parker*, 886 S.W.2d 908, 916-17 (Mo. banc 1994).

Resp. Ex. G, p. 18; State v. Weaver, 912 S.W.2d at 517.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. The United States Supreme Court has clearly delineated the standard for establishing a due process violation based on the prosecutor's failure to disclose evidence material to the defense. A Brady violation occurs where (1) the

prosecutor suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the issue of guilt or punishment. Brady v. Maryland, 373 U.S. at 87; United States v. Walrath, 324 F.3d 966, 969 (8th Cir. 2003). To obtain habeas relief on a Brady claim, a petitioner must show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 676 (1985). A reasonable probability of a different outcome exists where the failure to disclose the evidence "undermines confidence in the outcome of the trial." Id. at 678. The cumulative effect of suppressed evidence is considered for purposes of determining its materiality. Kyles v. Whitley, 514 U.S. 419, 436 & n.10 (1995). "A conviction will stand where a Brady violation was not prejudicial and amounts to harmless error." Walrath, 324 F.3d at 969 (internal punctuation and citation omitted).

The Missouri Supreme Court properly applied the law set forth in Brady v. Maryland and United States v. Bagley to conclude that the undisclosed evidence here did not undermine confidence in the verdict. As described by the Missouri Supreme Court, the State turned over a significant amount of material concerning Tabler, which it concluded made the allegedly undisclosed material "pale in comparison." A thorough review of the record supports the Missouri Supreme Court's conclusion. Petitioner's trial counsel spent a significant amount of time focusing the jury's attention on Tabler's criminal history, the relatively minor nature of the charges Tabler was facing and the lengthy prison term he might be sentenced to but for his testimony against petitioner, Tabler's ability to obtain access to petitioner's legal papers while they were confined together, and Tabler's motives in testifying. In particular, trial counsel repeatedly pointed out that Tabler was positioned to get a five-month sentence instead of a sixteen-year sentence, in return for his testimony against Weaver. See Tr. on Appeal, Vol. III, pp. 990-92, 995-1000, 1002-03, 1014-17. There is no reasonable probability the result would have been

different had the additional matters been disclosed.

With respect to the 911 tape and the notation on the arrest record, the Missouri Supreme Court found that petitioner did not explain the significance the 911 tape had to the defense, and failed to disclose the relevance of the notation "D in maroon jacket," and thus failed to establish that the allegedly suppressed evidence was material. A thorough review of the record supports the Missouri Supreme Court's conclusion. Moreover, the police dispatcher who handled the radio calls concerning the shooting of Taylor, Pamela O'Donnell, testified that she received a call about the shooting which described the assailants as two black males in a dark blue car, one wearing maroon clothing, and she put out a dispatch including that description. Tr. on Appeal, Vol. IV, pp. 1584-85; 1592-93. A defense witness named Lawrence Ducharme testified that he saw a black man run from the woods after he heard shots, and the man was wearing a "red, wine, maybe burgundy colored like a jogging type suit" with long pants. Tr. on Appeal, Vol. III, pp. 1146-47, 1150. Conrad Wragg, the witness petitioner refers to, testified that after he heard shots, he looked out the window and saw a black male wearing a burgundy track suit with long pants. Tr. on Appeal, Vol. IV, p. 1595. Wragg later went to the Normandy Police Station and gave a written statement that he had seen a black male wearing a plain burgundy sweatsuit, and the statement was admitted into evidence. Id. at 1597-1601. State witness Christine Coslick testified that she heard shots and saw two black men near the woods, one of whom was wearing a maroon shirt. Tr. on Appeal, Vol. II, p. 665. State witness Wendy Holliday testified that she heard shots and saw two black men chasing a third man, and the man directly behind the victim was wearing "a burgundy colored top and burgundy pants, like maroon colored pants." Id., p. 707. There was significant evidence presented at trial concerning the clothing petitioner was wearing and the clothing witnesses described, to support petitioner's theory of misidentification. The Court concludes there is no reasonable probability the result would

have been different had this evidence been disclosed, when the effect of all the allegedly suppressed material is considered cumulatively.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. See Linehan, 315 F.3d at 924. Moreover, the Court finds the Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims Four, Five and Six.

F. Claim Seven - Admission of Hearsay Evidence - Confrontation Clause Errors.

Petitioner asserts that the trial court improperly allowed hearsay evidence of the victim's state of mind to explain why he was in possession of a gun, and the introduction of this evidence violated the Confrontation Clause of the Sixth Amendment. Petitioner asserts that the state of mind exception to the hearsay rule did not apply, because he denied any participation in the shooting and did not raise self-defense or accident defenses, and therefore the victim's state of mind was completely irrelevant. Petitioner further asserts there was no evidence he ever threatened the victim or was aware the victim was a witness for the federal government against Larry Shurn, his co-defendant's brother. Petitioner asserts that at trial, the victim's wife, Juanita Taylor, testified that her husband feared for his life, that Daryl Shurn intended to kill him, and that Daryl Shurn gave her husband the "thumbs down" gesture when they saw each other in court. A St. Louis Police Department detective, Jerry Leyshock, testified the "word on the street" was that the Shurns intended to kill Taylor.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> In his second point, Weaver claims the trial court erred in admitting hearsay evidence. During cross-examination of police officer Cantwell, defense counsel elicited that the police found a briefcase belonging to Taylor near his body and that it contained a cocked and loaded .32 caliber handgun. It appears the defense was attempting to use the handgun evidence to create an inference that the victim was a violent person involved in the drug trade.
>
> In response to this evidence, the prosecutor called Taylor's wife and another police office, who collectively testified that Taylor had told them that he was carrying a gun because the word on the street was that Daryl Shurn intended to kill Taylor and that Shurn gave Taylor the "thumbs down" gesture when they saw one another in the city courts building.
>
> In order for evidence to be admissible, it must be relevant, logically tending to prove a fact in issue or corroborate relevant evidence that bears on the principal issue. *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied* 454 U.S. 933 (1981). Weaver argues that because he was not attempting to prove self-defense, and because the briefcase and its contents were not relevant to the defense that he had been misidentified while jogging, evidence of Taylor's motivation for carrying the loaded handgun should not have been admitted. While Weaver is correct that the primary thrust of the defense was misidentification, the defendant

> injected the issue that the victim was carrying a loaded weapon. That tactic was designed to permit the jury to infer that the victim was violent and posed a threat to defendant. Thus, it was defense counsel's tactic to inject into the case the victim's state of mind.
>
> Under the doctrine of curative admissibility, "where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Lingar*, 726 S.W.2d 728, 734-35 (Mo. banc 1987), *cert. denied* 484 U.S. 872 (1987). Under this doctrine, the defendant must first have introduced evidence, even though it might be technically inadmissible evidence. *See State v. Shurn*, 866 S.W.2d 447, 458 (Mo. banc 1993), *cert. denied* 513 U.S. 837 (1994). The victim's statement of fear of the defendant as a reason for carrying the gun was relevant and not unduly prejudicial under the state of mind exception to the hearsay rule. *Id.; State v. Boliek*, 706 S.W.2d 847, 850 (Mo. banc 1986), *cert. denied* 479 U.S. 903 (1986).

Respondent's. Ex. G, pp. 12-13; State v. Weaver, 912 S.W.2d at 510.

The Missouri Supreme Court addressed petitioner's claim only with respect to whether the trial court properly admitted the statements under the state-of-mind exception to the hearsay rule and the doctrine of curative admissibility under Missouri law. The state supreme court did not discuss petitioner's claim that admission of such statements violated the Confrontation Clause. The state court's opinion therefore rests

on adequate and independent state law grounds. It is well established that federal habeas courts are barred from reviewing claims decided on adequate and independent state law grounds. See Coleman, 501 U.S. at 729-30.

Because the Missouri Supreme Court relied on adequate and independent state law grounds in resolving this issue, this Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup v. Delo, 513 U.S. 298, 314-15 (1995). Therefore, dismissal of this claim is appropriate.

In view of the gravity of this proceeding, however, the Court will review the merits of petitioner's Confrontation Clause claim. Petitioner argues that introduction of Taylor's statements violated the Confrontation Clause because the state-of-mind exception is not applicable in this case. Petitioner further argues that introduction of Taylor's statements prejudiced him because it conveyed the impression petitioner acted as a "hit man" to kill Taylor to prevent him from testifying against the Shurns.

A review of the record shows that over relevancy objections by the State, petitioner's trial counsel elicited on cross-examination of police officer Cantwell that Taylor's briefcase had been found at the scene, and contained a loaded, cocked gun. Petitioner referred to and admitted into evidence a photograph of the gun. Tr. on Appeal, Vol. III, pp. 935-38. The statements at issue were admitted in response to this evidence. Juanita Taylor, the victim's wife, testified that Taylor told her he was carrying a gun "because the word was out on the street that Smokey [a nickname for Daryl Shurn] was going to kill him." Id., p. 1098. Juanita Taylor also testified that Taylor

told her he had seen Larry Shurn while at the city courts, and Larry Shurn gave him a "thumbs down" gesture. Id. Detective Leyshock testified that Taylor told him the "word on the street" was that the Shurns were going to kill him, and as a result, Taylor was going to carry a gun. Id., pp.1108-09.

Petitioner's trial counsel objected to these statements as hearsay, irrelevant and prejudicial. Id., pp. 1030-32. The trial court overruled counsel's objections and stated it would admit the testimony for the limited purpose of showing the victim's state of mind. Id., p. 1031-32. In each instance, immediately prior to the witnesses' testimony concerning Taylor's statements, the trial court cautioned the jury that the testimony they were about to hear was "not being admitted to show the truth of the information testified to but is only being admitted for the purpose of showing the state of mind" of the victim. Id., pp. 1098, 1108.

Federal habeas review is limited to determining whether a conviction violated the Constitution, laws or treaties of the United States. Estelle v. McGuire, 502 U.S. 62, 68 (1991). State law governs the admissibility of evidence in a state criminal proceeding. Clark v. Groose, 16 F.3d 960, 963 (8th Cir.), cert. denied, 513 U.S. 834 (1994). To the extent petitioner bases his claim on state law evidentiary rulings, his claim is not cognizable in a habeas proceeding. Estelle, 502 U.S. at 68.

Petitioner also argues that admission of the alleged hearsay statements violated his rights under the Confrontation Clause. A federal court may grant habeas relief where a state court's evidentiary ruling "infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted). To establish such a violation, petitioner's burden is "much greater than that required on direct appeal and even greater than the showing of plain error." Mendoza v. Leapley,

5 F.3d 341, 342 (8th Cir. 1993).

The Confrontation Clause guarantees a criminal defendant "the right to physically face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (citing Delaware v. Fensterer, 474 U.S. 15, 18-19 (1985)). Petitioner alleges a violation of his right to cross-examine the victim. "[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of question that defense counsel may ask during cross-examination." Ritchie, 480 U.S. at 52 (citing California v. Green, 399 U.S. 149 (1970)). Usually the right is satisfied "if defense counsel receives wide latitude at trial to question witnesses." Id. (citing Fensterer, 474 U.S. at 20). The absence of testing of a witness' testimony "calls into question the ultimate integrity of the fact-finding process." Ohio v. Roberts, 448 U.S. 56, 63-64 (1980).

Under certain circumstances, an out-of-court statement is sufficiently reliable to dispense with the usual right to confrontation. In Roberts, the Supreme Court clarified that an out-of-court statement is admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66. The rationale behind the rule is that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S. 805, 817 (1990).

The statements that Taylor made to his wife and to Detective Leyshock constitute hearsay. The Missouri Supreme Court addressed this issue, finding that while the primary thrust

of the defense was misidentification, petitioner injected the issue that the victim was carrying a loaded weapon. The state court concluded the evidence was a defense tactic was designed to permit the jury to infer that the victim was violent and posed a threat to the defendant, and thus, was intended to inject into the case the victim's state of mind. The state court then discussed the doctrine of curative admissibility which provides that "where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." State v. Lingar, 726 S.W.2d 728, 734-35 (Mo. banc 1987), cert. denied, 484 U.S. 872 (1987). The state court concluded, "The victim's statement of fear of the defendant as a reason for carrying the gun was relevant and not unduly prejudicial under the state of mind exception to the hearsay rule." Respondent's Ex. G, p. 13; State v. Weaver, 912 S.W.2d at 510.

The doctrine of curative admissibility and the state of mind exception to the hearsay rule are analytically distinct. See State v. Armontrout, 8 S.W.3d 99, 111 (Mo. banc 1999), cert. denied, 529 U.S. 1120 (2000). The Missouri Supreme Court's discussion, however, appears to conflate these two issues. The doctrine of curative admissibility applies only where the defendant has initially introduced inadmissible evidence. Goffstein v. State Farm Fire & Cas. Co., 764 F.2d 522, 524 (8th Cir. 1985); State v. Middleton, 998 S.W.2d 520, 528 (Mo. banc 1999), cert. denied, 528 U.S. 1167 (2000). "In that situation, the opposing party may introduce otherwise inadmissible evidence of its own to rebut or explain inferences raised by the first party's evidence." Middleton, 998 S.W.2d at 528 (internal citation omitted). "A party may not . . . introduce inadmissible evidence to rebut inferences raised by the introduction of admissible evidence during cross-examination." Id. (citations omitted). "Absent an exception [to the hearsay rule], hearsay testimony cannot be used to rebut inferences drawn from admissible evidence adduced during cross-examination." Id.

(citations omitted).

Under these principles, if the doctrine of curative admissibility was properly applied, the Missouri Supreme Court necessarily found that evidence Taylor had a gun was irrelevant and erroneously admitted. The Court's discussion of the issue, however, appears to be that the gun evidence was injected to raise a self-defense issue, which would be relevant. Despite the fact that trial counsel introduced evidence of the gun, the defense was strictly based on misidentification, and petitioner denied that he knew or had ever met Taylor, or had any participation in Taylor's killing. There was no evidence from the State's witnesses that Taylor knew petitioner. In closing argument, trial counsel did not argue about or even indirectly allude to the gun or to Taylor's potential for violence. This Court finds it more likely that trial counsel was attempting to plant the idea that Taylor was a man who had enemies, which would support the defense that someone else killed Taylor, or perhaps was attempting to lessen the jury's sympathy for Taylor by depicting him as someone who carried a gun in addition to associating with violent drug dealers.

The Missouri Supreme Court's conclusion that the state of mind exception to the hearsay rule applied is somewhat troublesome. The Court concluded it was relevant that Taylor feared "the defendant" and not unduly prejudicial to admit evidence to explain why Taylor carried the gun, but the testimony of Juanita Taylor and Detective Leyshock was that Taylor feared Daryl Shurn, not William Weaver. It is not clear how the fact that Taylor feared Shurn enough to carry a gun becomes relevant in petitioner's trial.

Assuming for purposes of this opinion that admission of the hearsay testimony from Juanita Taylor and Detective Leyshock was error and violated petitioner's Confrontation Clause rights, the issue is whether petitioner was prejudiced by it. See Chapman v. California, 386 U.S. 18, 21-24 (1967) ("reasonable doubt" standard for harmless error); State v.

Debler, 856 S.W.2d 641, 649 (Mo. banc. 1993). Petitioner argues the evidence was prejudicial because it conveyed the impression petitioner acted as a "hit man" to kill Taylor.

After a careful review of the entire record, the Court concludes that admission of the hearsay testimony was harmless beyond a reasonable doubt. The hearsay testimony was that Taylor feared Daryl Shurn and had seen Larry Shurn give Taylor a "thumbs down" sign; the testimony did not link petitioner to Taylor, or to Larry or Daryl Shurn. Thus, the evidence was not direct and at most allowed an inference as to motive. The other evidence at trial against petitioner was stronger and more directly linked him to Taylor's killing--the eyewitness testimony of a number of witnesses; testimony concerning petitioner's apprehension while running barefoot in Pasadena Hills far from his home, but not far from where Daryl Shurn's car was wrecked; testimony by Police Officer Gardiner that it was petitioner he saw run from Shurn's wrecked car; uncontroverted testimony that petitioner's car was parked in the Mansion Hills apartment parking lot; and testimony that petitioner's keys were found in Daryl Shurn's wrecked car after the accident. Although petitioner's trial counsel worked hard to challenge the State's evidence, the cumulative effect of the circumstantial and direct evidence was strong although not overwhelming, and petitioner's testimony that he was simply jogging in the area after his lover had failed to meet him at the Mansion Hills apartments ultimately offered little in the way of substantive rebuttal to the State's case. For these reasons, the Court can say beyond a reasonable doubt that the hearsay testimony did little, if anything, to strengthen the State's case. As a result, it concludes the error, if any, was harmless. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Seven.

H. Claim Eight - Denial of Rule 29.15 Discovery.

Petitioner argues that his conviction occurred in

violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights when the state motion court denied his request for discovery contained in his Rule 29.15 pleadings, which sought to show that the State's decision to seek death in petitioner's case was made in an arbitrary and discriminatory manner.

Under § 2254, a federal court "[s]hall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Kenley v. Bowersox, 228 F.3d 934 (8th Cir. 2000) (quoting 28 U.S.C. § 2254). The law is well settled that "infirmities in the state's post-conviction remedy procedure cannot serve as a basis for setting aside a valid original conviction. . . . Errors or defects in the state post-conviction proceedings do not, *ipso facto*, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." Kenley, 228 F.3d at 938 (quoting Williams v. State, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, 451 U.S. 990 (1981)).

Petitioner's eighth claim for habeas relief asserts nothing more than an infirmity in the state's postconviction process. As such it is not cognizable in the instant § 2254 proceedings and will be denied.

I. Claim Nine - Autopsy Hearsay.

Petitioner asserts in Claim Nine that his conviction and sentence were obtained in violation of the Fifth, Sixth and Fourteenth Amendments because the trial court allowed, over objection, hearsay testimony relating to the autopsy performed on Taylor following his death. Petitioner asserts that the autopsy was performed by a Dr. Gantner, who did not testify, but testimony was provided by Dr. Turgeon, who did so after merely reviewing the autopsy records. Petitioner states that Dr. Gantner was suffering from heart trouble at the time of trial, but

the record shows he was not truly unavailable to testify. The trial court rejected the suggestion of petitioner's counsel that Dr. Gantner testify by deposition. Petitioner asserts that Dr. Turgeon's testimony as to the manner and means of Taylor's death, i.e., six gunshot wounds to the head, formed the basis for the State's closing argument characterizing the killing as a cold-blooded, execution-type killing of a potential witness.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> Weaver argues that the autopsy report of the victim should not have been admitted into evidence because it was hearsay. One exception to the hearsay rule is that business records, if properly identified, may be admitted. The custodian of the autopsy report testified as to its identity, the mode of preparation and that it was made in the regular course of business. On that basis, the court could receive the report in evidence. § 490.680, RSMo 1994; *State v. Cheatham*, 340 S.W.2d 16, 19 (Mo. 1960); *State v. Jennings*, 555 S.W.2d 366, 367 (Mo.App. 1977).

Respondent's Ex. G, pp. 18-19; State v. Weaver, 912 S.W.2d at 517.

The Missouri Supreme Court addressed petitioner's claim only with respect to whether the trial court properly admitted the statements under the business records exception to the hearsay rule under Missouri law. The state supreme court did not discuss petitioner's claim that admission of such statements violated his federal constitutional rights. The state court's opinion therefore rests on an adequate and independent state law ground. It is well established that federal habeas courts are barred from reviewing claims decided on adequate

and independent state law grounds. See Coleman, 501 U.S. at 729-30.

Because the Missouri Supreme Court relied on adequate and independent state law grounds in resolving this issue, this Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of this claim is appropriate.

In view of the gravity of this proceeding, however, the Court will review the merits of petitioner's constitutional claims. Petitioner argues that introduction of the autopsy report violated his Confrontation Clause and due process rights because Dr. Gantner was available to testify. Petitioner further argues that introduction of the autopsy report through Dr. Turgeon prejudiced him because it formed the basis of the prosecutor's argument that this was a cold-blooded, execution-style killing.

Federal habeas review is limited to determining whether a conviction violated the Constitution, laws or treaties of the United States. Estelle, 502 U.S. at 68. State law governs the admissibility of evidence in a state criminal proceeding. Clark, 16 F.3d at 963. To the extent petitioner bases his claim on state law evidentiary rulings, his claim is not cognizable in a habeas proceeding. Estelle, 502 U.S. at 68.

Petitioner also argues that admission of the alleged hearsay statements violated his rights under the Confrontation Clause and due process clause. A federal court may grant habeas relief where a state court's evidentiary ruling "infringes upon a specific constitutional protection or is so prejudicial that

it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted). To establish such a violation, petitioner's burden is "much greater than that required on direct appeal and even greater than the showing of plain error." Mendoza, 5 F.3d at 342.

As previously stated, the Confrontation Clause guarantees a criminal defendant "the right to physically face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. at 51 (citing Fensterer, 474 U.S. at 18-19). Petitioner alleges a violation of his right to cross-examine the author of the autopsy report. "[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of question that defense counsel may ask during cross-examination." Ritchie, 480 U.S. at 52 (citing Green, 399 U.S. 149). Usually the right is satisfied "if defense counsel receives wide latitude at trial to question witnesses." Id. (citing Fensterer, 474 U.S. at 20). The absence of testing of a witness' testimony "calls into question the ultimate integrity of the fact-finding process." Ohio v. Roberts, 448 U.S. at 63-64.

Under certain circumstances, an out-of-court statement is sufficiently reliable to dispense with the usual right to confrontation. In Roberts, the Supreme Court clarified that an out-of-court statement is admissible "only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 66. The rationale behind the rule is that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Idaho v. Wright, 497 U.S. at 817.

The Confrontation Clause "does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." Wright, 497 U.S. at 813. The Clause does, however, "operate[] in two separate ways to restrict the range of admissible hearsay." Ohio v. Roberts, 448 U.S. at 65. First, in most cases, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Id. "A demonstration of unavailability, however, is not always required." Id. at 65, n.7 (citing Dutton v. Evans, 400 U.S. 74 (1970) ("Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.")) In United States v. Inadi, 475 U.S. 387, 400 (1986), the Court held that the Confrontation Clause does not require a showing of unavailability as a condition to admission of out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfied Federal Rule of Evidence 801(d)(2)(E), which excludes from the definition of hearsay a coconspirator's out-of-court statements. In Inadi, the Court limited Ohio v. Roberts to its own specific situation of former testimony, explaining that unavailability was relevant in that context because former testimony seldom had independent value of its own. Id., 475 U.S. at 394. Federal appellate courts have concluded that Inadi's reasoning supports the proposition that reliable out-of-court statements generally can be constitutionally introduced without producing an available declarant. See, e.g., Minner v. Kerby, 30 F.3d 1311, 1314-15 (10th Cir. 1994) (admission of police chemist's laboratory notes did not violate the Confrontation Clause, where the notes had sufficient particularized indicia of reliability, and if the chemist had testified, he likely would have relied on his notes and his knowledge of standard lab procedures); United States v. Johnson, 971 F.2d 562, 572-73 (10th Cir. 1992) (introduction of bank records through testimony of investors, rather than available bank custodian, did not violate Confrontation Clause);

Manocchio v. Moran, 919 F.2d 770, 784 (1st Cir. 1990) (introduction of autopsy report for proving cause of death without personal presence of examining pathologist who prepared report, and absent showing of his unavailability, did not violate Confrontation Clause), cert. denied, 500 U.S. 910 (1991).

Second, the Confrontation Clause authorizes only the admission of hearsay "marked with such trustworthiness that there is no material departure from the general rule." Ohio v. Roberts, 448 U.S. at 65 (internal punctuation and citation omitted). "[C]ertain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection. Id. at 66 (internal punctuation and citation omitted). "Properly administrated the business and public records exceptions would seem to be among the safest of the hearsay exceptions." Id. at 66, n.8 (quoting Comment, 30 La.L.Rev. 651, 668 (1970)). The Supreme Court has also suggested that the necessary "indicia of reliability" requirement can be met where hearsay evidence is supported by "a showing of particularized guarantees of trustworthiness." Idaho v. Wright, 497 U.S. at 816 (citations omitted).

The leading case on the admission of an autopsy report where the available medical examiner was not produced is Manocchio, 919 F.2d 770. In that case, the government sought to introduce an autopsy report about an autopsy performed by a forensic pathologist who had since moved to another country. The testimony of another signer of the report, the keeper of the records, was offered to lay the foundation for admission. Id. at 772. The First Circuit, relying on Inadi, found that the government was not required to establish the examining pathologist's unavailability in order to enter the report into evidence. In a lengthy and thorough opinion, the Court concluded that an autopsy report did not fall within the business records exception or other firmly rooted exception to the

hearsay rule, but did contain particularized guarantees of trustworthiness sufficient to be admissible over a Confrontation Clause objection. 919 F.2d at 773-77. In particular, the First Circuit focused on these factors: (1) the report was properly authenticated at trial as having been prepared by a qualified physician under the auspices of the medical examiner's office in accordance with the established procedures of the office; (2) there was no showing of a possible motivation on the part of the examiner to falsify the report; (3) the report's inclusion of double hearsay from a non-medical police report was, at worst, harmless error where the accuracy of the included information was not at issue; and (4) the report's conclusion of homicide amounted to no more than a restatement of the examiner's medical conclusion that death resulted form the multiple injuries observed on the body. 919 F.2d at 777. The Court stated that statements in the autopsy report which described the condition of the corpse "are reliable for all of the reasons that routine business records or public records are deemed reliable." Id. at 778. The Court explained:

> Like the information contained in business records, the reliability of the descriptive observation portion of autopsy records prepared by state or county medical examiners' offices is enhanced by the routine and repetitive circumstances under which such reports are made. And since the reports are made at the time of the autopsy, their reliability is greater than a later-recollected description by the preparer of the record. Like information contained in public records, reliability is further enhanced by the existence of statutorily regularized procedures and established medical standards according to which autopsies must be performed and reports prepared, and by the fact that autopsies are carried out in a laboratory environment by trained individuals with

specialized qualifications.

Manocchio, 919 F.2d at 778.

In this case, the Missouri Supreme Court concluded that the autopsy report qualified as a business record, an admissible hearsay exception under Missouri evidence law. See Mo. Rev. Stat. § 490.680 (1996). As an initial matter, petitioner has not shown that Dr. Gantner, the examining pathologist, was available. The record shows the testimony at trial was that he was at home, having been recently released from the hospital, awaiting a heart transplant with an automatic pump dripping medication into his lung in preparation for the transplant. Tr. on Appeal, Vol. III, pp. 1053, 1055-56. Petitioner has not presented evidence that Dr. Gantner would have been able to attend the trial and testify. Nonetheless, given the gravity of this case, the Court will assume for purposes of this opinion that Dr. Gantner was available to testify.

This Court concludes, however, that admission of the autopsy report in absence of a showing of the preparer's unavailability did not violate petitioner's Confrontation Clause rights. The custodian of records of the St. Louis County Medical Examiner testified that Dr. Gantner was the Chief Medical Examiner for the county, that Dr. Gantner had performed the autopsy on Charles Taylor on July 6, 1987, prepared an autopsy report and delivered it to her, and that she kept the report with records of autopsies performed in the county. Tr. on Appeal, Vol. III, pp. 1051-52, 1059, 1061. The custodian also testified that the information in autopsy reports is made at or near the time of the occurrences they describe, and that the reports are kept in the ordinary course of business. Id. at 1060.

Dr. Ronald Turgeon, a physician and forensic pathologist who has been employed by the county medical examiner's office since 1981, testified as to Dr. Gantner's

professional education and credentials. Dr. Turgeon testified that he had reviewed the autopsy report Dr. Gantner prepared following Taylor's autopsy. Dr. Turgeon testified from the report that the cause of death was multiple gunshot wounds to the brain, and that Taylor sustained six gunshot wounds to the head, one in the abdomen, one in the back, and a graze wound on the left arm. Tr. on Appeal, Vol. III, pp. 1063-74.

The Supreme Court has established that reliable out-of-court statements generally can be constitutionally introduced without producing an available declarant. Inadi, 475 U.S. 387, 400. Therefore, the mere fact that Dr. Gantner was not produced does not establish a Confrontation Clause violation. This Court concludes that the autopsy report at issue has particularized guarantees of trustworthiness that support its admission into evidence in the absence of the preparer, specifically: (1) the report was properly authenticated at trial as having been prepared by a qualified physician under the auspices of the St. Louis County Medical Examiner's Office; (2) the report was made at or near the time of the autopsy and was kept among medical examiner's office records in the ordinary course of business; (3) there was no showing of a possible motivation on the part of the examiner to falsify the report; and (4) Dr. Turgeon's testimony was limited to the report's observations about the conditions of the corpse, and the cause of death.

The Court also concludes that petitioner has not established that admission of the autopsy report violated his due process rights. In a § 2254 habeas proceeding, "a federal court's review of alleged due process violations stemming from a state court conviction is narrow." Hamilton, 809 F.2d at 470. Petitioner fails to show any prejudice resulting from admission of the autopsy report. Petitioner claims he was prejudiced because the testimony as to the manner of death enabled the prosecutor to argue this was an execution-style killing. What petitioner fails to explain is how the result would have been

different had Dr. Gartner been present to testify about the results of the autopsy. Petitioner offers no evidence that the autopsy was incorrectly done, or that Taylor did not have six gunshot wounds to the head. Petitioner has not met his burden to show that the state court's evidentiary ruling was "so prejudicial that it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted).

For these reasons, the Court concludes that admission of the autopsy report did not violate either petitioner's Confrontation Clause or due process rights. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Nine.

J. Claim Ten - Ineffective Assistance of Trial Counsel.

Petitioner asserts in Claim Ten that his conviction and sentence were obtained in violation of the Fifth, Sixth and Fourteenth Amendments because he was denied effective assistance of counsel. Petitioner asserts that his counsel failed to exercise the customary care and diligence which a reasonably prudent attorney would perform under similar circumstances. Specifically, petitioner asserts that trial counsel was ineffective in the following respects:

Claim 10.B.: Trial counsel failed to object to the testimony of a prosecution witness that petitioner had admitted he was a "hit man" who had committed other murders;

Claim 10.C.: Trial counsel failed to present evidence that the victim, Charles Taylor, always carried a gun.

Claim 10.D.: Trial counsel failed to provide evidence and documents demonstrating the St. Louis County Prosecutor's Office's longstanding practice of striking blacks from jury venire panels.

Claims 10.E. and F.: Trial counsel failed to thoroughly question Officer Cantwell regarding officers' unsuccessful efforts to locate a gun at the scene of Taylor's death.

Claims 10.G and H: Trial counsel failed to object to Missouri Approved Instruction 25, concerning mitigating circumstances.

Claim 10.I.: Trial counsel failed to provide evidence that petitioner had previously been shot while working as a disc jockey.

Claim 10.J.: Trial counsel failed to seek a change of venue due to pretrial publicity regarding Taylor's death and his involvement as a potential witness in the federal prosecution of a drug dealer named Ricky Durham.

Claim 10.K.: Trial counsel failed to object to Police Officers Lee and Cantwell's opinions regarding why gunshot residue was not found on petitioner's hands immediately after his arrest.

Claim 10.L.: Trial counsel failed to call Missouri Highway Patrol chemist Carl Rothove to rebut the testimony of Officers Lee and Cantwell.

Claim 10.M.: Trial counsel failed to adequately cross-examine Officer Cantwell regarding his trial testimony that he did not request gunpowder residue testing of the clothes petitioner was wearing at the time of his arrest.

Claim 10.N.: Trial counsel failed to object to evidence and argument intended by the prosecutor to explain why no gunpowder residue was found on petitioner.

Claim 10.O.: Trial counsel failed to correct a prejudicial statement made by one of the jurors during voir dire, that life

imprisonment is more costly than the death penalty.

Claim 10.P.: Trial counsel failed to impeach Dr. Turgeon regarding his testimony that no bullet fragments were recovered from Taylor's body.

Claim 10.Q.: Trial counsel failed to present ballistic evidence which would have suggested that more than one weapon was used in Taylor's killing.

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must first demonstrate that his attorney failed to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances. Strickland v. Washington, 466 U.S. 668, 687 (1984). This requires the petitioner to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id.; Sanders v. Trickey, 875 F.2d 205, 207-08 (8th Cir.), cert. denied, 493 U.S. 898 (1989) (the standard of conduct is that of a reasonably competent attorney; to comply with this requirement, petitioner must prove that his counsel's assistance fell below an objective standard of reasonableness, considering all the circumstances faced by the attorney at the time in question). The petitioner must then demonstrate that he suffered prejudice as a result of his attorney's actions. To show the prejudice required by Strickland, the petitioner must demonstrate that counsel's errors were so serious as to render the result of the trial unreliable or the proceeding fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

Because defense counsel is presumed to be effective, Cox v. Wyrick, 642 F.2d 222, 226 (8th Cir.), cert. denied, 451 U.S. 1021 (1981), petitioner bears a heavy burden in proving that counsel has rendered ineffective assistance. Howard v. Wyrick, 720 F.2d 993, 995 (8th Cir. 1983), cert. denied, 466 U.S. 930 (1984); see also Sidebottom v. Delo, 46 F.3d 744, 751

(8th Cir.), cert. denied, 488 U.S. 975 (1995).

The Court begins its analysis with the Missouri Supreme Court's opinion. The Missouri Supreme Court correctly set forth the controlling Strickland standard:

> Under his tenth point, defendant again in violation of Rule 84.04(d) combines a series of eleven claims of ineffective assistance of counsel which he asserts should have been found by the motion court. To prevail, Weaver had to establish before the motion court that trial counsel failed to perform at the degree of skill, care or diligence of a reasonably competent attorney and that the performance was so prejudicial as to undermine the reliability of the result of the trial. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984).

State v. Weaver, 912 S.W.2d at 517.

The Missouri Supreme Court's conclusion that trial counsel did not render ineffective assistance is not a finding of fact binding on this Court to the extent stated by 28 U.S.C. § 2254(d). "However, the findings made by the state court in deciding the claim are subject to the deference required by that statute." Nave v. Delo, 62 F.3d 1024, 1037 (8th Cir. 1995) (citing Strickland, 466 U.S. at 687), cert. denied sub nom Nave v. Bowersox, 517 U.S. 1214 (1996); see also Sloan, 54 F.3d at 1382 (ineffective assistance claims are mixed questions of law and fact; legal conclusions are reviewed de novo and state court findings of fact are presumed to be correct under 28 U.S.C. § 2254(d)).

> **Claim 10.B.: Trial counsel failed to object to the testimony of a prosecution witness that petitioner had admitted he was a "hit man" who had**

committed other murders.

In Claim 10.B, petitioner contends that trial counsel rendered ineffective assistance by failing to object to the testimony of Robert "Dutch" Tabler that petitioner had (1) admitted he was a hit man who had committed other murders, (2) related to Tabler the circumstances regarding an earlier contract murder he had performed, and (3) related to Tabler the size of the bullet holes in the victim's head after he was shot.

The Missouri Supreme Court addressed this claim as follows:

A.

> The first claim is that competent counsel would have objected to Tabler's testimony that Weaver was a "hit man" because such testimony was evidence of other crimes. No evidence was adduced on this point at the post-conviction hearing. Trial counsel, though called to testify, was not asked why she had failed to object. Had an objection been made, it would have been of no avail. Tabler's testimony was reporting a statement made by the defendant in the context of explaining Weaver's involvement in the murder of Taylor. Among other justifications for admitting evidence of other crimes is where such evidence is admissible to establish motive. *State v. Oxford*, 791 S.W.2d 396, 399 (Mo. banc 1990). Evidence that Weaver claimed to have been a killer for hire was relevant to establishing his motive for the murder of Taylor. While details of other murders may have been inadmissible, the evidence here was limited to what defendant told Tabler was his reason for involvement in this murder. Motive was a

legitimate issue in the case.

State v. Weaver, 912 S.W.2d at 518.

Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(2). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court noted that no evidence was adduced on this claim at the postconviction hearing, and although trial counsel, Ms. Black, was called to testify, she was not asked why she failed to object to the challenged testimony. The Missouri Supreme Court concluded that any objection would have been futile, as evidence of other crimes is admissible under Missouri law to establish motive, evidence that petitioner was a killer for hire was relevant to establish his motive for Taylor's murder, and motive was a legitimate issue in the case. Implicit in the Missouri Supreme Court's discussion is that counsel did not fail to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. As stated above, the United States Supreme Court has clearly delineated the standard for ineffective assistance of counsel claims. In order to prevail on such a claim, petitioner must first demonstrate that his attorney failed to exercise the degree of skill and diligence that a reasonably competent attorney would exercise under similar circumstances. Strickland, 466 U.S. at 687. Petitioner must then demonstrate that he suffered prejudice as a result of his attorney's actions. Id.

A thorough review of the record supports the conclusion

that petitioner cannot establish his counsel's performance fell below acceptable standards. State law governs the admissibility of evidence in a state criminal proceeding. Clark, 16 F.3d at 963. The evidence was admissible under applicable Missouri law for the reasons stated by the Missouri Supreme Court. Petitioner therefore cannot establish the first prong of Strickland.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.B.

Claim 10.C.: Trial counsel failed to present evidence that the victim, Charles Taylor, always carried a gun.

In Claim 10.C., petitioner contends that trial counsel rendered ineffective assistance by failing to provide evidence that the victim, Taylor, had carried a gun for several years prior to his death, which would have contradicted the testimony of Juanita Taylor and Detective Leyshock who testified that Taylor had recently begun carrying a gun out of fear of Daryl Shurn.

This claim was not presented to the Missouri Supreme Court or to the postconviction motion court. As a result, this claim is procedurally defaulted and the Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750.

Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of this claim is appropriate.

Moreover, if the Court were to reach the merits of the claim, it concludes that plaintiff cannot establish either ineffective assistance of counsel or resulting prejudice under Strickland. The evidence was that Taylor feared the Shurns, and as a result had recently started carrying a gun. Because petitioner denied knowing or ever having met Taylor, and denied any role in Taylor's death, whether Taylor carried a gun for a brief time or for years is irrelevant to petitioner's misidentification defense. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.C.

Claim 10.D.: Trial counsel failed to provide evidence and documents demonstrating the St. Louis County Prosecutor's Office's longstanding practice of striking blacks from jury venire panels.

In Claim 10.D., petitioner contends trial counsel rendered ineffective assistance by failing to provide evidence and documents to demonstrate that the state prosecutor's office had a longstanding practice of striking blacks from jury venire panels.

This claim was not presented to the Missouri Supreme Court or to the postconviction motion court. As a result, this claim is procedurally defaulted and the Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has

he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15. Therefore, dismissal of this claim is appropriate.

Moreover, in view of the Eighth Circuit's denial of petitioner's Batson claim in Weaver v. Bowersox, 241 F.3d 1024, even assuming counsel rendered ineffective assistance, petitioner cannot show he was prejudiced as a result. Strickland, 466 U.S. at 691.

Claims 10.E. and F.: Trial counsel failed to thoroughly question Officer Cantwell regarding officers' unsuccessful efforts to locate a gun at the scene of Taylor's death.

In Claims 10.E. and F., petitioner contends that trial counsel rendered ineffective assistance by failing to thoroughly question Police Officer Cantwell regarding the unsuccessful efforts the police had made to locate a gun at the scene of Taylor's death. Petitioner states that while trial counsel elicited from Cantwell that several officers had searched the area and at one point used metal detectors, this was inadequate. Petitioner states that in the trial of his co-defendant, Daryl Shurn, Cantwell testified that he and another officer thoroughly searched the area from the Mansion Hill Apartments to the area where petitioner was arrested. The following day, additional officers searched the entire area, and three days after the shooting, as many as ten police officers again searched the area. Thereafter, another team of officers again searched the area from the Mansion Hill Apartments to the area of petitioner's arrest, this time also using metal detectors.

The Missouri Supreme Court addressed this claim as follows:

E.

> Weaver next faults counsel for failing to bring out evidence regarding law enforcement's inadequate search for a gun. On that point, the motion court found that counsel's decision was not demonstrated to be prejudicial to the defendant's case under the *Strickland* standard. It might be added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court stated that the postconviction motion court found counsel's decision was not demonstrated to be prejudicial under Strickland, and added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards with respect to this aspect of Cantwell's cross examination. Trial counsel elicited from Cantwell that no gun was found; this was consistent with petitioner's misidentification defense. Petitioner therefore cannot establish either prong of Strickland.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 10.E. and F.

Claims 10.G and H: Trial counsel failed to object to Missouri Approved Instruction 25, concerning mitigating circumstances.

In Claims 10.G. and H., petitioner contends that trial counsel rendered ineffective assistance by failing to object to penalty phase jury instruction 25, which precludes the jury from considering a mitigating circumstance unless the jury unanimously finds that it exists.[9] Petitioner asserts that this

---

[9]Instruction No. 25, which was based on Missouri Approved Instruction 3d 313.44 (eff. 1/1/87), states as follows:

> If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 23, you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstances or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Charles Taylor.
>
> You may consider:
>
> 1. Whether defendant has no significant history of prior criminal activity.
>
> 2. Whether the defendant was an accomplice in the murder of Charles Taylor and whether his participation was relatively minor.

instruction is therefore directly contrary to the United States Supreme Court's decision in Mills v. Maryland, 486 U.S. 367 (1988) (finding unconstitutional jury instructions which led the jury to believe they could only return a verdict of life imprisonment if they unanimously agreed to specific facts they would consider to be mitigating). Petitioner contends that at

---

> 3. Whether the defendant acted as an accomplice and was not the trigger man.
>
> 4. The defendant has two young children and has a mother in failing health.
>
> 5. Whether the defendant has worked with young people in encouraging them to stay out of trouble and avoid drugs.
>
> 6. Whether the defendant, after his incarceration, has worked with inmates in teaching them reading and language skills, and assists inmates with disabilities.
>
> 7. Whether the defendant, since his incarceration, has been given responsibilities of trustee, indicating traits of character showing cooperation, helpfulness and a willingness to work within the confines of authority.
>
> You may also consider any circumstances which you find from the evidence in mitigation of punishment.
>
> If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

Respondent's Ex. B. at 145.

minimum, trial counsel should have reviewed the Mills decision with the jury and told the jury that it need not unanimously agree on a mitigating circumstance in order to consider the mitigating circumstance.

Petitioner states that at the postconviction hearing, he provided an affidavit from juror Helen Bode which stated the jury first considered and found unanimously the aggravating circumstances which warranted death, and then began its consideration of mitigating circumstances. In the affidavit, Ms. Bode stated that the jury was not able to unanimously agree on each and every mitigating circumstance, and ultimately considered only those mitigating circumstances on which it unanimously agreed. See Supplemental Record, Affidavit of Helen Bode.

Testimony regarding the deliberative process and jurors' conduct during deliberations is inadmissible. See Federal Rule of Evidence 606(b); Bannister v. Armontrout, 4 F.3d 1434, 1444 n.15 (8th Cir. 1993), cert. denied, 513 U.S. 1103 (1995). After careful review of Ms. Bode's affidavit, the Court concludes the affidavit fits within the prohibition of Rule 606(b), Fed. R. Evid.[10] Petitioner cannot rely on juror Bode's

---

[10]Rule 606 states in pertinent part:

> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a jury may

statements in this habeas proceeding to impeach the jury's sentencing determination. Therefore, the Court will not consider the affidavit.[11]

The Missouri Supreme Court addressed this claim as follows:

B.

> Weaver claims counsel was ineffective in failing to object to the giving of MAI-CR3d 313.44 (effective 1-1-87). This Court has held that instruction, when followed by MAI-CR3d 313.46 (effective 1-1-87), is constitutional and does not violate *Mills v. Maryland*, 486 U.S. 367 (1988). *State v. Petary*, 790 S.W.2d 243, 245 (Mo. banc 1990). Here MAI-CR3d 313.46 was given and any tinge of unconstitutionality

---

> testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Federal Rule of Evidence 1101(e) provides that the Federal Rules of Evidence apply to habeas corpus petitions filed in federal court under 28 U.S.C. § 2254.

[11]The postconviction motion court similarly refused to consider the Bode Affidavit. See Tr. of Post-Conviction Motion Hearing, Vol. 1, pp. 70-71.

removed.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court stated it has previously held that the instruction at issue, MAI- CR3d 313.44, is constitutional and does not violate the Mills holding when followed by MAI-CR3d 313.46 (eff. 1/1/87). See State v. Petary, 781 S.W.2d 534, 542-44 (Mo. 1989) (en banc), vacated and remanded, 494 U.S. 1075 (1990), reaff'd, 790 S.W.2d 243 (Mo.) (en banc), cert. denied, 498 U.S. 973 (1990). In the instant case, MAI-CR3d 313.46 was given.[12] Implicit in the Missouri Supreme Court's ruling is that trial counsel was not ineffective for failing to object to a proper instruction.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. The Eighth Circuit has found consistently that identical portions of substantially similar jury instructions on mitigating circumstances did not violate Mills.

---

[12]Instruction No. 26 was taken from MAI-CR3d 314.46. The instruction stated:

> You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

Respondent's Ex. B, p. 146.

See McDonald v. Bowersox, 101 F.3d 588, 599-600 (8th Cir. 1996), cert. denied, 521 U.S. 588 (1997); Reese v. Delo, 94 F.3d 1177, 1186 (8th Cir. 1996), cert. denied, 520 U.S. 1257 (1997); Murray v. Delo, 34 F.3d 1367, 1381 (8th Cir. 1994), cert. denied, 515 U.S. 1136 (1995); Battle v. Delo, 19 F.3d 1547, 1561-62 (8th Cir. 1994) (instruction does not violate the Constitution because it does not "lead the jury to the inescapable conclusion that it must unanimously agree that there [are] mitigating circumstances before it [can] fix life in prison as [petitioner's] punishment."), on reh'g, 64 F.3d 347 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996).

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 10.G. and H.

Claim 10.I.: Trial counsel failed to provide evidence that petitioner had previously been shot while working as a disc jockey.

In Claim 10.I., petitioner contends that trial counsel rendered ineffective assistance by failing to provide to the jury evidence that petitioner had been shot previously while working as a disc jockey. Petitioner asserts that the prosecutor improperly elicited testimony from several of petitioner's character witnesses as to whether they were aware petitioner had been shot. Trial counsel objected to the relevance of the questions, but if counsel had investigated petitioner's background, she would have learned he was shot while working as a disc jockey, which would have directly rebutted the State's position that petitioner was wounded as a result of being a hit man.

The Missouri Supreme Court addressed this claim as follows:

C.

> Weaver claims trial counsel was ineffective for failing to object to the prosecutor's inquiries regarding bullet holes in Weaver's body and for failing to present evidence that Weaver "was the victim of someone dissatisfied with his work" as a disc jockey. This claim was not preserved in the post-conviction relief motion and is deemed waived.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court found this claim was waived because it was not presented to the postconviction motion court. The state court's opinion therefore rests on an adequate and independent state procedural ground. It is well established that federal habeas courts are barred from reviewing claims decided on adequate and independent state grounds. See Coleman, 501 U.S. at 729-30. This Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup, 513 U.S. at 314-15 (1995). Therefore, dismissal of this claim is appropriate based on procedural default.

Moreover, even if this Court were to review the merits of petitioner's claim, it would conclude petitioner has failed to establish either that counsel rendered ineffective assistance, or that he was prejudiced as a result. Strickland, 466 U.S. at 691. A careful review of the record shows that no witness testified he

or she was aware petitioner had been shot; the issue was alluded to only by the prosecutor's questions in cross-examining three of petitioner's numerous witnesses. Tr. on Appeal, Vol. III, pp. 1179, 1183, 1205. On one occasion, trial counsel objected on relevancy grounds to the State's question whether the witness knew if petitioner had been shot, and the objection was overruled. There was no evidence presented that petitioner had been shot, and the State did not argue in closing that petitioner had been shot or that this tended to show he was a hit man. Petitioner has not demonstrated that his counsel's alleged failure to investigate and present evidence rose to the level of constitutionally ineffective assistance of counsel, or that he was prejudiced as a result. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.I.

Claim 10.J.: Trial counsel failed to seek a change of venue due to pretrial publicity regarding Taylor's death and his involvement as a potential witness in the federal prosecution of a drug dealer named Ricky Durham.

In Claim 10.J., petitioner contends that trial counsel rendered ineffective assistance by failing to seek a change of venue due to pretrial publicity regarding Taylor's death and his involvement as a potential witness in the federal prosecution of a drug dealer named Ricky Durham. Petitioner asserts that shortly before trial, the St. Louis Post-Dispatch newspaper published an article related to witness intimidation which focused on the facts and circumstances of Taylor's death. Petitioner also asserts that local media, both print and television, provided substantial coverage during the March 1988 trial of his co-defendant, Daryl Shurn, and immediately prior to petitioner's trial there were additional news reports and stories regarding shootings and witness intimidation. Petitioner asserts that his trial counsel failed to adequately voir dire the

jury on the effects of this pretrial publicity, and failed to seek a change of venue based thereon.

The Missouri Supreme Court addressed this claim as follows:

D.

> Weaver next complains that counsel failed to seek a change of venue due to pretrial publicity. The trial court found that the voir dire record adequately covers that potential problem and that no prejudice resulted under *Strickland* by counsel's failure to seek a change of venue. The record supports that finding.

State v. Weaver, 912 S.W.2d at 518.

The Missouri Supreme Court stated that the trial court found the voir dire record adequately covered the potential problem of jury exposure to pretrial publicity, and that under Strickland no prejudice accrued to petitioner as a result of trial counsel's failure to seek a change of venue. The Missouri Supreme Court found that the record before it supported the trial court's finding.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. "Due process requires that the accused receive a trial by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Pruett v. Norris, 153 F.3d 579, 584 (8th Cir. 1998). There is no presumption of prejudice from pretrial publicity, however, unless the petitioner establishes that the publicity "was so extensive and corrupting that a reviewing court is required to 'presume unfairness of constitutional magnitude.'" Pruett, 153 F.3d at 585 (quoting Dobbert v. Florida, 432 U.S. 282, 303

(1977)); see Snell v. Lockhart, 14 F.3d 1289, 1293 (8th Cir.), cert. denied sub nom Snell v. Norris, 513 U.S. 960 (1994). A presumption of pretrial publicity is "rarely applicable, being reserved for extreme situations." Snell, id. Cases in which the presumption has applied were found to be exceptional "not because of the amount of publicity but rather because of the 'circus atmosphere' of the trial proceedings themselves." Id. Nothing in the record suggests that petitioner's trial was anything other than orderly. Petitioner has not presented evidence in this case which would warrant a presumption of prejudice.

Thus, in order to obtain habeas relief, petitioner would have to demonstrate actual prejudice. Murphy, 421 U.S. at 800; Pruett, 153 F.3d at 587. "In making this assessment, a court looks to 'indications in the totality of the circumstances' to determine if any inference of juror partiality rendered the trial fundamentally unfair." Pruett, 153 F.3d at 587 (quoting Murphy, 421 U.S. at 799). "The relevant question is whether the jurors actually seated 'had such fixed opinions that they could not judge impartially the guilt of the defendant.'" Id. (quoting Patton v. Yount, 467 U.S. 1025, 1035 (1984)). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961).

A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards in failing to seek a change of venue, because there is no evidence of juror partiality, and consequently no prejudice. The great majority of the venire members had heard nothing about the matter in the press. Some venire members had heard about the matter but had no specific recollections of media reports, and a few had heard about the matter but stated they could put aside what they had heard and consider only the evidence presented at trial.

Petitioner has not shown that pretrial publicity made the public in general or the venirepanel in particular prejudiced against him. The voir dire does not demonstrate that there was a great deal of publicity in this case, based on the relatively few panel members who had heard anything about the matter. Cf. Swindler v. Lockhart, 885 F.2d 1342, 1348 (8th Cir. 1989) (petitioner's constitutional rights not violated where the trial court denied motion to change venue although 98 out of the 120 venire persons had some knowledge of the case) (citing cases), cert. denied, 495 U.S. 911 (1990); Leisure v. Bowersox, 990 F. Supp. 769, 796-97 (E.D. Mo. 1998) (same, where approximately 95 percent of prospective jurors had heard something about the case). Nothing in the record of this case shows "such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside." Murphy v. Florida, 421 U.S. 794, 800 (1975). Petitioner therefore cannot establish prejudice under Strickland.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.J.

Claims 10.K. and L.: Trial counsel failed to object to Police Officers Lee and Cantwell's opinions regarding why gunshot residue was not found on petitioner's hands immediately after his arrest, and failed to call a highway patrol chemist to rebut this testimony.

Petitioner argues that trial counsel rendered ineffective assistance by failing to object to Officers Lee and Cantwell's opinions regarding why gunshot residue was not found on petitioner's hands immediately after his arrest, and by failing to call Missouri Highway Patrol chemist Carl Rothove to rebut this testimony. Petitioner asserts that Lee and Cantwell testified gunshot residue would not have been found on petitioner's hands at the time of arrest because more than one hour had elapsed since the shooting, and perspiration on petitioner's hands at the time of arrest would have negated any possibility of identifying gunshot residue through available tests. Petitioner asserts that Lee and Cantwell's testimony constituted expert testimony, and counsel was ineffective in failing to object to their testimony on the grounds that they were not qualified as experts to provide the testimony, and in failing to voir dire either witness as to his expert qualifications.

Petitioner asserts that trial counsel should have called Highway Patrol chemist Rothove as a witness at trial to rebut Lee and Cantwell's testimony. Petitioner states Rothove testified at the Rule 29.15 proceeding that the likelihood of finding gunshot residue increases with the number of shots fired, that a revolver deposits more residue than a semi-automatic or autoloading gun, that a .357 caliber gun tends to leave substantial residue deposits, and that meaningful residue results can be obtained for up to six hours after a person has fired a gun.

The Missouri Supreme Court addressed these claims as follows:

E.

> Weaver next faults counsel for failing to bring out evidence regarding law enforcement's inadequate search for a gun. On that point, the motion court found that counsel's decision was

not demonstrated to be prejudicial to the defendant's case under the *Strickland* standard. It might be added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

F.

Weaver argues that counsel was ineffective in failing to object to a police officer's testimony about a lack of gunshot residue on Weaver's hands and counsel's failure to call a highway patrol chemist. The question by the state was prompted by defense counsel's questioning regarding gunshot residue tests and the negative results of those tests. It was appropriate on redirect to ask the officers if they had any explanation for the lack of the gunshot residue. No evidence was offered at the post-conviction relief hearing that the officers were not qualified to explain what factors might reduce the possibility of finding residue. Counsel is not ineffective for failing to make an objection unless it is apparent that the objection would have been meritorious. *Six*, 805 S.W.2d at 168.

The police officers testified that, based on their experience, passage of time between firing and the time of taking the tests (in this case, four to five hours) and perspiration and the wiping of hands can cause gunshot residue to dissipate. The chemist did not directly refute those statements but testified only that the number of shots fired increases the chance of finding residue, that it is possible to find residue for up

> to six hours, although residue is more likely found within one and one-half hours, and that the chemist had no opinion regarding the effect of perspiration. The chemist's testimony would not have established any defense but, at most, would have marginally impeached the testimony of the police officers regarding the absence of gunshot residue. It cannot be said that counsel's alleged failure undermines confidence in the outcome of the trial. Thus, Weaver has failed to establish the prejudice prong of the *Strickland* requirement.

State v. Weaver, 912 S.W.2d at 518-19.

The Missouri Supreme Court observed that the State's questions concerning the lack of gunshot residue were prompted by defense counsel's questioning regarding gunshot residue tests and the negative results of those tests and found that it was appropriate for the State to ask the officers on redirect examination if they had any explanation for the negative test results. The Court stated no evidence was offered at the postconviction relief hearing that the officers were not qualified to explain what factors might reduce the possibility of finding gunshot residue, and that counsel is not ineffective for failing to object unless it is apparent the objection would have been meritorious.

The Missouri Supreme Court stated the officers testified based on their experience that gunshot residue can dissipate because of the passage of time between firing a gun and taking a gunshot residue test (in this case, four to five hours), as well as because of perspiration and the wiping of hands. The Court stated that the chemist, Rothove, did not directly refute those statements but testified only that (1) the number of shots fired increases the chance of finding residue, (2) it is possible to find residue for up to six hours, although residue is more likely

found within one and one-half hours, and (3) he had no opinion regarding the effect of perspiration. The Court concluded the chemist's testimony would not have established a defense, and at most, would have "marginally impeached" the testimony of Lee and Cantwell. The Missouri Supreme Court concluded that counsel's alleged failure did not undermine confidence in the outcome of the trial, and therefore the prejudice prong of Strickland was not established.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. As stated above, the United States Supreme Court has clearly delineated the standard for ineffective assistance of counsel claims in Strickland, 466 U.S. at 687. A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards. This Court concurs with the Missouri Supreme Court's description of Lee and Cantwell's testimony, its evaluation of the content and probative value of Rothove's testimony,[13] and its conclusion that counsel's alleged failure did not undermine confidence in the outcome of the trial. Thus, there can be no prejudice under the Strickland analysis.

---

[13]This Court's review of Rothove's testimony shows that he stated the greatest likelihood of obtaining positive gunshot residue test results occurs within the first two hours after firing, as there is a "fairly dramatic decrease in the residue levels" after two hours. Tr. on Appeal, PCR Hearing, Vol. 1, pp. 28-29. Rothove also testified that his lab does not run tests on samples taken more than six hours after firing, because the results would not be "meaningful." Id. at 28. Although Rothove's testimony is slightly different than as described by the Missouri Supreme Court, the difference does not change the analysis or the result.

Petitioner has not established that the Missouri Supreme Court's decision with respect to these issues resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claims 10.K. and L.

Claim 10.M.: Trial counsel failed to adequately cross-examine Officer Cantwell regarding his trial testimony that he did not request gunpowder residue testing of the clothes petitioner was wearing at the time of his arrest.

Petitioner argues that trial counsel rendered ineffective assistance by failing to adequately cross-examine Officer Cantwell regarding his trial testimony that he did not request gunpowder residue testing of the clothes petitioner was wearing at the time of his arrest. Petitioner states that trial counsel had received information prior to trial that Cantwell had, in fact, requested gunpowder residue testing of petitioner's clothing. Petitioner asserts this area of inquiry could have provided impeachment of Officer Cantwell.

The Missouri Supreme Court addressed this claim as follows:

G.

As to the claim that counsel should have more extensively cross-examined one of the officers about the gunshot residue evidence, the motion

> court found that there was no evidence to support this ground presented at the evidentiary hearing. Having failed to present evidence about what more extensive cross-examination would have disclosed, the claim was properly denied.

State v. Weaver, 912 S.W.2d at 519.

The Missouri Supreme Court stated that petitioner did not present evidence to support this claim at the evidentiary hearing on postconviction relief. The state court stated that because petitioner failed to present evidence about what more extensive cross-examination would have disclosed, the claim was properly denied.

A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell below acceptable standards, as there is no evidence what additional cross-examination of Cantwell would have produced. This Court agrees with the Missouri Supreme Court's conclusion that without such evidence, there can be no proof that trial counsel's performance was below acceptable levels, or that any prejudice resulted.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.M.

Claim 10.N.: Trial counsel failed to object to evidence and argument intended by the prosecutor to explain why no gunpowder residue was found on petitioner.

Petitioner argues that trial counsel rendered ineffective assistance by failing to object to evidence and argument intended by the prosecutor to explain why no gunpowder residue was found on petitioner. Petitioner states this argument was based on Officer Lee and Cantwell's testimony "under the guise of expert testimony," and the gunpowder residue tests ordered by Cantwell. Petitioner asserts that evidence was available to trial counsel, including the testimony of Missouri Highway Patrol chemist Carl Rothove, concerning residue specimen testing and "other factors related to the possible type of weapon involved in the shooting, caliber, length of time between the shooting, and forensic examination of the perpetrator." First Amended Petition for Writ of Habeas Corpus, ¶ N, p. 27.

The Missouri Supreme Court addressed this claim as follows:

H.

Weaver claims that counsel should have objected to the evidence and argument of the prosecutor as to why no gunpowder residue was found on him. The evidence pointed to in support of this argument was that of the chemist, who indicated that "very little data was provided" by the officers responsible for obtaining the residue tests as to when the tests were performed or the type of weapon. From this, Weaver argues that counsel should have presented evidence demonstrating that the absent data precluded the state's explanation for

> the absent residue. As noted above, the additional information about when the residue tests were performed and the type of weapon were not shown to undermine the officers' explanation. Counsel's failure to present evidence which would have been purely impeachment on a collateral matter of the officers' lack of attention to detail in reporting data to the chemist is clearly within the range of conduct by competent counsel. Weaver also fails to establish prejudice on this point.

State v. Weaver, 912 S.W.2d at 519.

The Missouri Supreme Court stated that petitioner supported this claim with Rothove's testimony at the postconviction relief hearing. Rothove testified that "very little data was provided" to his lab by the officers responsible for obtaining the gunpowder residue tests, as to when the tests were performed in relation to the time of shooting, or as to the type of weapon. Tr. on Appeal, PCR Hearing, Vol. I, p. 30. The Missouri Supreme Court stated that as it previously discussed with respect to related claims 10.K. and 10.L. (10.E. and F. in the Missouri Supreme Court's opinion), the additional information about when the residue tests were performed and the type of weapon were not shown to undermine Lee and Cantwell's testimony. The Missouri Supreme Court concluded that counsel's failure to present evidence on what would have been impeachment on a collateral matter, i.e., the officers' lack of attention to detail in reporting data to the chemist, was clearly within the range of conduct by competent counsel. State v. Weaver, 912 S.W.2d at 519. The Missouri Supreme Court also concluded that petitioner failed to establish prejudice on this claim. Id.

A thorough review of the record supports the conclusion that petitioner cannot establish his counsel's performance fell

below acceptable standards, as it has not been established that Lee and Cantwell's testimony should not have been admitted, and the Rothove testimony does not significantly undermine Lee and Cantwell's testimony. Thus, the prosecutor could introduce Lee and Cantwell's testimony, and then use the same as a basis for argument as to why there was no gunpowder residue found on petitioner. Trial counsel will not be found ineffective for failing to object to admissible evidence or argument. The Court also agrees with the Missouri Supreme Court's conclusion that no prejudice was shown.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.N.

Claim 10.O.: Trial counsel failed to correct a prejudicial statement made by one of the jurors during voir dire, that life imprisonment is more costly than the death penalty.

Petitioner argues that trial counsel rendered ineffective assistance during voir dire by failing to correct a prejudicial statement made by one of the jurors, Reis, that life imprisonment is more costly than the death penalty. Petitioner states that this misperception and prejudicial statement was conveyed to three other members of the jury, McGrath, Taylor and Kohler, who were consequently misled in considering the punishment phase evidence and appropriateness of the death

penalty. Petitioner states that information, statistics and evidence available to trial counsel would have clearly shown it is not less costly to impose the death penalty as opposed to a sentence of life imprisonment.

The Missouri Supreme Court addressed this claim as fo"ows:

I.

> Weaver complains that his defense counsel should have put on evidence to correct one member of the venire panel who, in response to a question on voir dire about her feelings regarding the death penalty, said,
>
> > I really haven't considered it in particular cases, but just as a fact of economics of the State keeping people for life and the cost and I would think that crime would go down if the death penalty were enforced more. So I haven't really thought about it in specific cases and thought that people should get it or not.
>
> Even though made in the presence of other jurors, the isolated response did not so permeate the trial that those jurors hearing it would be unlikely to follow the instructions. The economic cost of impose a death sentence is irrelevant to any issue submitted to the jury. Counsel cannot be faulted to failing to present irrelevant evidence. Neither error nor prejudice have been demonstrated. The claim is denied.

State v. Weaver, 912 S.W.2d at 519.

The Missouri Supreme Court stated that the juror's statement was "isolated" and "did not so permeate" the trial that the other jurors who heard it were likely to disregard the instructions given them with respect to issues of punishment. The Missouri Supreme Court also stated that the economic cost of imposing the death penalty is irrelevant to any issue submitted to the jury, and that counsel will not be faulted for failing to present irrelevant evidence.

A thorough review of the record supports the conclusion that the juror's statement was an isolated occurrence. The Eighth Circuit has strongly condemned as improper and prejudicial prosecutors' arguments that a jury should select the death penalty for economic reasons. See, e.g., Miller v. Lockhart, 65 F.3d 676, 682-83 (8th Cir. 1995) (due process violation occurred where, inter alia, prosecutor referred to "tremendous burden" life imprisonment for defendant would "put on the taxpayers" and implied that death penalty would cost less; argument injected irrelevant and prejudicial issue); Antwine, 54 F.3d at 1363-64 (closing argument improper and prejudicial where it referred to taxpayers' burden to pay for life imprisonment). Nonetheless, the Eighth Circuit found no due process violation where a prosecutor made a single, brief comment concerning the cost of life imprisonment, in the midst of a "tough, hard-hitting argument . . . based on the hard facts presented." Blair v. Armontrout, 916 F.2d 1310, 1324 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991) (one isolated though highly improper comment was not sufficiently prejudicial to render sentencing hearing unfair).

The parties have not cited any authority addressing the effect of this type of statement made by a juror, and the Court has found none. The Court concludes that because a prosecutor's isolated statement in closing argument concerning the economic cost of death was not found to render the

proceeding unfair, the same result must occur where the isolated statement is made by a juror during voir dire. Several factors compel this result: there was a significant time span between the juror's statement and the sentencing proceedings; only three other jurors heard the statement; a juror's statement during voir dire cannot be considered as influential or potentially prejudicial as a prosecutor's argument during sentencing proceedings, because the prosecutor represents the authority of the state; and the jurors were properly instructed on factors relevant to determining punishment, and are presumed to have followed the instructions given them. For these reasons, even assuming trial counsel should have objected to the juror's statement, no prejudice was shown.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.O.

Claim 10.P.: Trial counsel failed to impeach Dr. Turgeon regarding his testimony that no bullet fragments were recovered from Taylor's body.

Petitioner argues that trial counsel rendered ineffective assistance by failing to impeach Dr. Turgeon of the St. Louis County Medical Examiner's Office regarding his testimony that no bullet fragments were recovered from the victim during the autopsy. Petitioner asserts that this ground of impeachment would have severely undermined Dr. Turgeon's credibility, and

would have clearly rebutted the prosecution's argument that Taylor was the victim of a contract murder.

The Missouri Supreme Court addressed this claim as follows:

J.

> Weaver argues that counsel failed to impeach a physician's testimony that no bullet fragments were recovered from the victim's body by the testimony of two police officers that bullet fragments were recovered following the autopsy. In this case, there was virtually no dispute but that the victim died of six traumatic gunshot wounds to the head. The presence or absence of fragments was not necessary to establish the cause of death. The failure of counsel to present impeachment evidence regarding the matter of the recovery of bullet fragments is not prejudicial.

State v. Weaver, 912 S.W.2d at 519.

A review of the record supports both the Missouri Supreme Court's factual findings and its conclusions of law. There was no dispute as to the cause of death, and as petitioner asserted he had nothing to do with the killing, this evidence was irrelevant to his defense. Petitioner has not shown either that counsel's performance fell below acceptable standards or resulting prejudice.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at

924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.P.

Claim 10.Q.: Trial counsel failed to present ballistic evidence which would have suggested that more than one weapon was used in Taylor's killing.

Petitioner argues that trial counsel rendered ineffective assistance by failing to present ballistic evidence which would have suggested that more than one weapon was employed in Taylor's killing. Petitioner points to the testimony of Officer Crosswhite at the Rule 29.15 hearing, that he concluded the three bullets submitted to him for analysis were fired by the same type of revolver, but the evidence was inconclusive as to whether the bullets were fired by the same gun or what the caliber of the gun was. Petitioner asserts this testimony would have successfully impeached the testimony of several witnesses, although petitioner does not identify who these witnesses are, and would have supported petitioner's defense.

The Missouri Supreme Court addressed this claim as follows:

K.

Finally, Weaver challenges counsel's failure to present ballistics evidence showing more than one weapon was used. The evidence presented at the post-conviction hearing showed that the evidence on this point was inconclusive as to whether more than one weapon had been used. The motion court correctly found no prejudice

> in failing to present that evidence. In addition, the jury could have found that both Shurn and defendant had fired shots. The possibility that two guns might have been used was consistent with the state's case and would have done nothing to advance defendant's misidentification defense. This point is without merit.

State v. Weaver, 912 S.W.2d at 519-20.

A review of the record supports both the Missouri Supreme Court's factual findings and its conclusions of law. Officer Crosswhite testified that he was given fourteen bullet fragments from the Taylor killing to examine. Tr. on Appeal, PCR Hearing, Vol. II, pp. 270-71. Of these, he concluded that three were positively fired by the same type of revolver, probably a .38 or .357 Magnum, and the rest of the bullet evidence was inconclusive, meaning that it may or may not have been fired by the same firearm. Id. at 271-72. As the state court concluded, the possibility that two guns were used would not harm the state's case, and could not help petitioner's, which was based solely on misidentification. Because petitioner asserted he had nothing to do with the killing, this evidence was irrelevant to his defense. Petitioner has not shown that counsel's performance fell below acceptable standards or that prejudice resulted.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore,

petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim 10.Q.

K. Claim Eleven - Supplemental 29.15 Motion.

Petitioner asserts as his eleventh claim for relief that the state postconviction motion court refused to consider the claims petitioner presented in an untimely supplemental Rule 29.15 motion, and that this refusal violated his rights under the Fifth, Eighth and Fourteenth Amendments. Petitioner states that the supplemental motion contained allegations that trial counsel was ineffective for (1) failing to object to the constitutionality of certain guilt and penalty phase instructions, and (2) failing to inspect the contents of the victim's briefcase prior to trial. Petitioner asserts that by arbitrarily enforcing the Rule 29.15 time limits, the postconviction motion court denied him the opportunity to present violations of his constitutional rights. Petitioner also asserts that the time limits of Rule 29.15 fail to account for the nature and complexity of Rule 29.15 actions, particularly in death penalty cases.

The Missouri Supreme Court addressed this claim as follows:

> In his eleventh point, Weaver argues that he should have been permitted to file a supplemental Rule 29.15 motion after the time for filing amendments to such motion had run. The only authority cited for that proposition is *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994). In *Chambers* this Court observed that trial counsel's conduct was not ineffective in failing to object to an instruction. *Chambers* did not overrule the fundamental principle that the time limits for filing and amending pleadings under Rule 29.15 are valid and mandatory and the trial court is without authority to give

> additional time beyond that provided by Rule 29.15(f). *State v. Six*, 805 S.W.2d 159, 170 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991); *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). The motion court did not err in failing to permit a supplemental amended Rule 29.15 motion.

State v. Weaver, 912 S.W.2d at 520.

The Missouri Supreme Court's decision rested on the basis of a procedural default. "[A] procedural default under state law may constitute independent and adequate state law grounds precluding federal review." Oxford v. Delo, 59 F.3d 741, 744 (8th Cir. 1995) (citing Harris v. Reed, 489 U.S. 255, 262 (1989)), cert. denied sub nom Oxford v. Bowersox, 517 U.S. 1124 (1996). The Eighth Circuit has held that Rule 29.15 is both firmly established and regularly followed, and therefore is an adequate state ground to bar federal review. Malone v. Vasquez, 138 F.3d 711, 717 (8th Cir.) (verification requirements), cert. denied, 525 U.S. 953 (1998); see Sloan v. Delo, 54 F.3d at 1379-81 (time limit procedures under Rule 29.15 adequate).

The Missouri Supreme Court's decision on this issue therefore rests on adequate and independent state law grounds. It is well established that federal habeas courts are barred from reviewing claims decided on adequate and independent state law grounds. See Coleman, 501 U.S. at 729-30. Because the Missouri Supreme Court relied on adequate and independent state law grounds, this Court's consideration of the claim is barred unless petitioner satisfies either the "cause and prejudice" or "fundamental miscarriage of justice" exceptions to procedural bar. Coleman, 501 U.S. at 750. Petitioner has made no showing of cause and prejudice, nor has he made any demonstration of a fundamental miscarriage of justice occurring from failure to consider his claims. Schlup v. Delo, 513 U.S.

298, 314-15 (1995). Therefore, dismissal of this claim is appropriate.

L. Claim Twelve - Inadmissible Identifications.

Petitioner asserts as his twelfth claim for relief that his conviction and sentence of death were imposed in violation of the Fifth, Sixth and Fourteenth Amendments because testimony and evidence were admitted at trial regarding unduly suggestive lineup and show-up identifications held after petitioner' arrest.

1. Lineup Identification.

Christine Coslick and Robert Mackin testified at trial regarding their identification of petitioner in a lineup after his arrest. Coslick testified that on the morning of the shooting, she looked out her apartment window and saw a black male later identified as the victim being chased by two other black males through the grounds of the Mansion Hills apartments. One of the two pursuing males was wearing a maroon shirt. Coslick heard three or four shots. Coslick saw the two black males run back up toward the apartments, and then lost sight of them. Shortly thereafter, a car came around the road with the two men in it. She saw one of the men go back into the woods. She heard more shots, and then the man returned to the car and she saw the vehicle leave. Later that day, Coslick selected petitioner from a line-up, based on her recollection of the build and stature of the person she had seen, as well as her recollection of his shirt.

Robert Mackin testified he heard shots on the day of the killing, and looked out his window to see two men walking away from a wooded area, one of whom was wearing a dark red outfit. He lost sight of the men, and then saw a car come down from the upper parking lot. The passenger got out, and Mackin testified he was wearing the same dark red outfit. This man

walked back to the wooded area and Mackin heard more shots. Later that evening, Mackin selected petitioner from a lineup based on his clothing.

Petitioner asserts the lineup was unduly suggestive because it was comprised of several individuals but petitioner was the only one wearing red clothing. The others wore blue and white clothing. Petitioner also asserts that in addition to the unduly suggestively nature of the lineup, it occurred nearly twelve hours after the shooting. Petitioner states that neither Coslick nor Mackin testified they were able to clearly see any of the individuals they observed the day of the shooting, and their selection of petitioner was based on petitioner's general build, statute and color of clothing, which was similar to the individual they had seen earlier.

2. Show Up Identification.

Petitioner also asserts that the "show up" identification which was introduced into evidence at trial was unduly suggestive and unreliable. Petitioner states that the first police officer who responded to the scene of the shooting was Officer Gardiner. Upon arriving at the location of the shooting, Officer Gardiner saw a car similar to that described as being the getaway vehicle for the persons involved in the shooting. Officer Gardiner pursued the car onto Interstate 70 until it was involved in an accident, and both occupants ran from the car in opposite directions. Officer Gardiner pursued and apprehended one of the individuals, later identified as Daryl Shurn. Officer Gardiner and Shurn returned to the car. Later, petitioner, who had been arrested some distance away, was brought to the scene of the car accident for identification by Officer Gardiner. Petitioner states that even though Officer Gardiner testified he was never able to clearly view the second occupant of the vehicle, as a result of the unduly suggestive nature of the show up identification, he was able to state that petitioner was the other individual in the vehicle.

The Missouri Supreme Court addressed these issues as follows:

> Christine Coslick testified that on July 6, 1987, at about 7:45 a.m., while watching from her apartment in the Mansion Hills apartment complex, she saw a black male being chased by two other black males down a nearby hill into a wooded area. One of those giving chase was wearing a maroon shirt. She heard shots from the wooded area, saw the two black males return to the car and then saw the one in the maroon shirt go back to the woods. She heard additional shots, saw the man in the maroon shirt return to the car and then observed the vehicle leave. The man in the maroon shirt came within fifty years of Coslick. Later that same day, she viewed a lineup. At the lineup, Coslick remembered not only the shirt but the general build of the individual. The person she identified was defendant.
>
> Witness Robert Mackin testified that on the same date at the same time he was laying in bed in his apartment and heard shots. Upon going to the window, he saw two men walking briskly away from the wooded area, one of whom appeared to be in a "dark red outfit." This individual went back to the car then returned to the wooded area where Mackin heard three more gunshots. That day Mackin was taken to a lineup where the picked out the defendant based on statute and clothing.
>
> Weaver argues that because he was the only person in the lineup wearing maroon or red clothing, the trial court should have suppressed the identification. In order to succeed on this

claim, he must carry a burden of proof that there was a "very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

Lineups have been held not to be impermissibly suggestive merely because of the color or characteristics of the clothing of persons in the lineup. *State v. Tringl*, 848 S.W.2d 29, 32 (Mo.App. 1993); *State v. Morant*, 758 S.W.2d 110, 117 (Mo.App. 1988); *State v. Howard*, 699 S.W.2d 58, 59 (Mo.App. 1985). The rule seems to be that a lineup will be impermissibly suggestive only if the clothing is the sole basis for identification.

The linchpin of due process in identification procedures is reliability, not suggestiveness. *Manson*, 432 U.S. at 114. Here the witnesses relied not only on the color of clothing but of [sic] defendant's general build and appearance. Both witnesses had an opportunity to view Weaver at the time of the crime. Both witnesses' attention had been turned to Weaver because of the gunshots. Their identification of Weaver was consistent with their description. Both witnesses expressed a rather high level of certainty at the confrontation. The confrontation occurred the same day as the shooting. Under the totality of the circumstances, their identification has sufficient indicia of reliability. *See State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989). It is true that in the case of both witnesses, identification was based largely on general build and clothing. However, it cannot be said on the record here that a "very substantial likelihood of irreparable

misidentification" occurred. Short of such evidence, courts rely on the good sense and judgment of jurors for determining the trustworthiness of the identification.

> Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature . . . . The defect, if there be one, goes to weight and not to substance.

Manson, 432 U.S. at 117.

Weaver further complains about the identification of defendant near the scene where he was arrested by the officer who pursued the vehicle in which defendant was riding. After defendant was arrested, he was brought back to the crime scene. He now argues that this procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

To repeat, the linchpin of due process in identification procedures is reliability rather than suggestiveness. The reliability of identification is greatly enhanced by returning a freshly apprehended suspect to the scene of an offense for prompt identification by eyewitnesses. *State v. Pettit*, 719 S.W.2d 474, 477 (Mo.App. 1986), *see also State v. Jackson*, 477 S.W.2d 47, 51-52 (Mo. 1972). The identification by the pursuing officer at the scene was not impermissibly suggestive or unreliable.

Weaver, 912 S.W.2d at 520-21.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

The Missouri Supreme Court's determination is not contrary to clearly established federal law, nor is it unreasonably applied. The United States Supreme Court clearly delineated a two-part standard for evaluating identification testimony in Manson v. Brathwaite, 432 U.S. 98 (1977). A court must consider (1) whether the identification procedures were impermissibly suggestive; and (2) if they were impermissibly suggestive, whether under the totality of the circumstances "the suggestive procedures created a 'very substantial likelihood of irreparable misidentification.'" Manson, 432 U.S. at 116-17; see also United States v. Fields, 167 F.3d 1189, 1190 (8th Cir.) (describing the analysis required under Manson), cert. denied, 526 U.S. 1140 (1999). The Supreme Court stated that "reliability is the linchpin in determining the admissibility of identification testimony" and identified five factors to guide courts in assessing the reliability of pretrial identifications: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the

confrontation." Manson, 423 U.S. at 114.

The Missouri Supreme Court properly applied the law set forth in Manson to conclude that the identification testimony in this case did not violate petitioner's due process rights. Citing its decision in State v. Hornbuckle, 769 S.W.2d 89, 93 (Mo. 1989) (en banc), the state supreme court evaluated the record using the five factors set forth in Manson for determining the reliability of identification testimony. The state court determined the lineup was not impermissibly suggestive because clothing was not the sole basis for identification. Weaver, 912 S.W.2d at 520. The state court then proceeded to second part of the analysis, to determine whether under the totality of the circumstances, the suggestive procedures created a "very substantial likelihood of irreparable misidentification." Id. (quoting Manson, 432 U.S. at 116).

With respect to the lineup identifications, the Missouri Supreme Court observed that (1) the witnesses relied not only on the color of clothing but also on petitioner's general build and appearance; (2) both witnesses had an opportunity to view petitioner at the time of the crime, although from a distance; (3) both witnesses' attention had been turned to petitioner because of hearing the gunshots; (4) the witnesses' identification of petitioner was consistent with their description; (5) both witnesses expressed a rather high level of certainty at the confrontation; and (6) the confrontation occurred the same day as the shooting. Examining the totality of the circumstances, the Missouri Supreme Court concluded the lineup identification testimony had sufficient indicia of reliability, and the suggestive circumstances did not create a very substantial likelihood of irreparable misidentification.[14] Weaver, 912 S.W.2d at 520-21.

---

[14]A careful review of the record shows that the trial court limited Mackin and Coslick's testimony to whether the clothing and physical stature of the men they identified from the

With respect to the show up identification, the Missouri Supreme Court stated that the reliability of Officer Gardiner's identification of petitioner was "greatly enhanced by returning a freshly apprehended suspect to the scene," and concluded the identification was neither impermissibly suggestive nor unreliable. The record indicates Officer Gardiner testified that after Daryl Shurn's car hit other vehicles and was coming a halt, the passenger got out from the back seat and Gardiner "had quite a bit of time to look at him." Tr. on Appeal, Vol. II, p. 745. Officer Gardiner began getting out of his police car, pointed a shotgun at the passenger, and yelled for him to halt. At that point, the passenger was running up a small incline on the shoulder of the road, hesitated and turned around to look at Gardiner, and then continued to run. Id. at 747. Officer Gardiner turned his attention to apprehending Daryl Shurn, and later put out a description of the man who had gotten away. Id. at 747-52. Some time later, Officer Crain returned to the scene with petitioner, who Officer Gardiner testified he recognized as the man who had gotten out of Daryl Shurn's vehicle and run from him. Tr. on Appeal, Vol. II, p. 755. Officer Gardiner testified there was "[n]o doubt whatsoever, none" in his mind that petitioner was the same man he had previously seen. Id. at 756.

As stated above, a federal court may grant habeas relief where a state court's evidentiary ruling "infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process." Clark, 16 F.3d at 963 (citation omitted). To establish such a violation, petitioner's burden is "much greater than that required on direct appeal and even greater than the showing of plain error." Mendoza, 5 F.3d at 342.

---

lineup was the same as the clothing and physical stature of the men they had observed the morning of the shooting. Tr. on Appeal, Vol. II, pp. 615, 646-51; 665-68.

The Court finds petitioner has not established that the Missouri Supreme Court's decision with respect to these issues resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. See Linehan, 315 F.3d at 924. Even if the lineup procedures were improperly suggestive, the Missouri Supreme Court employed the proper analysis, derived from Manson, and did not unreasonably apply clearly established federal law in determining that the resulting identifications were reliable. In deciding that testimony regarding the show up identification was reliable, the state court did not make a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. See Linehan, 315 F.3d at 924. Moreover, the Court finds the Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id., 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Twelve.

L. Claim Thirteen - Unconstitutional Search.

Petitioner asserts as his thirteenth claim for relief that his conviction and sentence of death were imposed in violation of the Fourth, Fifth and Fourteenth Amendments because the trial court erred in overruling counsel's motion to suppress evidence that keys obtained from Daryl Shurn's car fit the doors, ignition, glove box and trunk of petitioner's vehicle.

Petitioner states that after the accident involving Shurn's car, the car was seized and a search warrant obtained. During execution of the warrant, a brown key case was among the items seized from Shurn's car. After petitioner's arrest, the car he was driving was towed from the Mansion Hills apartments parking lot and placed in police custody. Police officers then

took the keys obtained from Shurn's car and tried them to determine if they fit the doors and ignition of petitioner's vehicle. Petitioner argues this was a warrantless search of his vehicle which was not based on probable cause that the vehicle contained contraband, there were no exigent circumstances to support the search, and no police policies in place that would have called for the search. Thus, petitioner argues the key case should have been suppressed. Petitioner asserts that if probable cause had existed for the police to believe the keys fit his vehicle, they could have obtained a search warrant.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> After the crash, police found keys in the Shurn vehicle. In the meantime, Weaver's car, a Buick LeSabre, was found in the Mansion Hills parking lot. The LeSabre was towed from the parking lot and placed in police custody. The keys found in the Shurn vehicle were tried and found to fit the doors, ignition, glove box and trunk of the LeSabre.
>
> Weaver argues that no circumstances justified a warrantless search of his vehicle. Weaver does not seem to challenge the warrantless *seizure* of the vehicle. Here the vehicle was seized at the scene of a murder and was apparently used by Weaver as transportation to the scene of the crime. That justified the warrantless seizure of the vehicle.
>
> Checking the locks of the LeSabre to see if the keys found in the Shurn car fit the car found at the scene of the crime was not an unreasonable intrusion or violation of any expectation of privacy. Simply trying a key in an exterior lock

> of an automobile does not constitute a search. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991); *United States v. Lyons*, 898 F.2d 210, 212-13 (1st Cir. 1990); *United States v. Grandstaff*, 813 F.2d 1353, 1358 n.5 (9th Cir. 1987). Because the officers had probable cause to seize the vehicle, they could also have searched the interior of the car for weapons and other instrumentalities of the crime without obtaining a warrant. *Chambers v. Maroney*, 399 U.S. 42, 48-52 (1970). This would include opening the glove box. This point is denied.

State v. Weaver, 912 S.W.2d at 521.

Petitioner's search claim is not cognizable in this proceeding. "A Fourth Amendment claim of an unconstitutional search or seizure is not cognizable in a habeas corpus action unless the state has not 'provided an opportunity for full and fair litigation' of the claim." Sweet v. Delo, 125 F.3d 1144, 1149 (8th Cir. 1997) (quoting Stone v. Powell, 428 U.S. 465, 494 (1976)), cert. denied sub nom Sweet v. Bowersox, 523 U.S. 1010 (1998). This Court is "not empowered to examine whether the Missouri courts made errors of law in deciding the Fourth Amendment issues argued by" petitioner. Id. (citing Willett v. Lockhart, 37 F.3d 1265, 1270 (8th Cir. 1994) (en banc), cert. denied sub nom Willett v. Norris, 514 U.S. 1052 (1995)). "A search and seizure claim is cognizable in a habeas action only if 'the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure because of an unconscionable breakdown in the system.'" Id. (quoting Willett, 37 F.3d at 1273). Petitioner has not attempted to make such a showing in this case, and the record does not support it. It is clear petitioner had the opportunity for full and fair litigation on the Fourth Amendment

issue, as the Missouri Supreme Court affirmed the trial court's ruling on the issue. Petitioner may not relitigate that ruling here. See Newman v. Hopkins, 192 F.3d 1132, 1134-35 (8th Cir. 1999), vacated on other grounds, 529 U.S. 1084 (2000), reaff'd on remand, 247 F.3d 848 (8th Cir. 2001), cert. denied, 536 U.S. 915 (2002).

Even if the claim were cognizable as a due process claim under the Fifth Amendment, it is without merit. The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The Missouri Supreme Court's decision rested on two alternative grounds. First, the state court held that merely trying the keys in the locks of petitioner's car did not constitute a search or violate any expectation of privacy, citing precedent from federal circuit courts of appeal. Second, the state court held that because the police had probable cause to seize petitioner's car, they could have searched its interior for weapons or other instrumentalities of the crime without obtaining a warrant, citing Chambers v. Maroney, 399 U.S. 42, 48-52 (1970) (automobile may be searched without a warrant in circumstances that would not justify warrantless search of house or office, if probable cause exists to believe the automobile contains articles that officers are entitled to seize).

The Supreme Court of the United States does not appear to have decided whether trying a key in a lock constitutes a search for purposes of the Fourth Amendment. Thus, the Missouri Supreme Court's decision that trying a key in a lock is not a search and does not implicate privacy concerns is not contrary to and does not violate clearly established federal law. The state court's alternative holding, that because the police had probable cause to seize petitioner's car they could have searched it for instrumentalities of the crime, is also not contrary to and does not violate clearly established federal law. See Chambers, 399 U.S. at 48.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable ~~application~~ of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Thirteen.

M. Claim Fourteen - Unconstitutional Application of Death Penalty.

Petitioner asserts as his fourteenth claim for relief that his conviction and sentence of death were imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the St. Louis grand jury that indicted him did not contain a fair cross-section of the community, as a result of systematic exclusion of non-whites from serving on the grand jury. At trial, the parties stipulated that the evidence presented and adduced on the systematic exclusion of non-whites from the grand jury presented in co-defendant Daryl Shurn's case would constitute the record for petitioner.

Petitioner presented this issue to the Missouri Supreme Court, which addressed the issue as follows:

> Weaver claims that the composition of the grand jury resulted from systematic exclusion of nonwhites, resulting in underrepresentation of African-Americans. Essentially the same data supporting the claim were submitted in *State v. Shurn*, 866 S.W.2d 447, 455 (Mo. banc 1993). There the data were held to be unpersuasive. No precedential value would be gained by

> reconsidering the claim here. The point is denied.

Weaver, 912 S.W.2d at 521.

In State v. Shurn, 866 S.W.2d 447 (Mo. 1993) (en banc), the Missouri Supreme Court discussed the issue as follows:

> Shurn's first complaint relates to the racial composition of the grand jury that indicted him. At trial, he filed a motion to dismiss and quash the indictment, which alleged that the grand jury resulted from systematic exclusion of non-whites, women, and those 21 through 34 years of age. Shurn argued that this violated his equal protections rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and article I, §§ 2, 10 and 18(a) of the Missouri Constitution. He now contends that the trial court erroneously denied his motion because too few African-Americans served on the grand jury.
>
> To establish an equal protection claim in the context of grand jury selection, the defendant must prove that the grand jury selection procedure has "resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). The defendant must first show membership in a cognizable racial group singled out for different treatment. *Id.* Second, the defendant must show an underrepresentation "by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors,

over a significant period of time." *Id.* The burden is on the defendant to show a substantial underrepresentation of his group in order to make a prima facie case, and shift the burden to the state. *Id.* at 495.

Shum's evidence detailed the racial composition of seven grand jury pools, comprising 2,790 members with a known race. Of these, 186 members--or 6.67 percent--were African-American. Shum's evidence also detailed the racial composition of 10 grand juries, estimating that 11 blacks served on them. Because each grand jury has 12 jurors, the racial composition of the 10 grand juries was 9.17 percent black (Shum asserts the percentage of black grand jurors as 8.33 percent). Thus, the percentage of black grand jurors exceeded the percentage of blacks in the pool.

Moreover, a representative number of blacks served on grand juries. According to the stipulated census figures, blacks accounts for 11.26 percent of the population of St. Louis County. The disparity between the census of St. Louis County (11.26 percent black) and the racial composition of the grand juries referenced by Shum (9.17 percent black) is insufficient to establish a prima facie equal protection claim under *Castaneda*. *See, e.g.*, *Castaneda*, 430 U.S. at 495-96; *State v. Baker*, 636 S.W.2d 902, 909 (Mo. banc 1982), *cert. denied*, 459 U.S. 1183 (1983).

State v. Shum, 866 S.W.2d at 455 (footnote omitted).

The Court begins its analysis with the Missouri Supreme

Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

This claim presents a mixed issue of law and fact. See United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998). The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The Missouri Supreme Court's decision rested on two factual findings. First, the state court found that the percentage of African-Americans who actually served on grand juries in St. Louis County during the relevant period exceeded the percentage in the grand jury pools. Second, the state court found that the racial composition of the grand jury pools was 6.67 percent African-American, the composition of grand juries was 9.17 percent African-American, and the percentage of African-Americans residing in St. Louis County was 11.26 percent. The Missouri Supreme Court concluded the percentage disparity was insufficient to establish a prima facie equal protection claim under the United States Supreme Court's decision in Castaneda v. Partida, 430 U.S. 482 (1977).

The Missouri Supreme Court in Shurn compared the disparity between the composition of the actual grand juries (9.17 percent African-American) and the county population (11.26 percent African-American), apparently examining

absolute disparity as opposed to comparative disparity.[15] The absolute disparity when comparing grand jury composition to county population is 2.09 percent, while the comparative disparity is 18.56 percent.[16] The absolute disparity when

---

[15]"'Absolute disparity' describes the percentage-point difference between a group's representation in the general population and that in the jury pool. . . . Meanwhile, 'comparative disparity' measures 'absolute disparity' in terms of the group's relative size in the general population. One simply divides the 'absolute disparity' percentage by the percentage of the population represented by the group in question." United States v. Sanchez, 156 F.3d 875, 879 n.4 (8th Cir. 1998). The Eighth Circuit has stated that "the comparative disparity calculation provides a more meaningful measure of systematic impact *vis-a-vis* the 'distinctive' group: it calculates the representation of African Americans in jury pools relative to the African-American community rather than relative to the entire population." United States v. Rogers, 73 F.3d 774, 776-77 (8th Cir.), cert. denied, 517 U.S. 1239 (1996); but cf. Floyd v. Garrison, 996 F.2d 947, 949 (8th Cir. 1993) (declining to adopt comparative disparity analysis as a better means of calculating underrepresentation, citing Castaneda, 430 U.S. at 495-96).

[16]The absolute disparity between African-American county residents and African-American grand jury members is calculated as follows: 11.26 percent African-American county residents, less 9.17 percent African-American grand jury members (11.26 - 9.17 = 2.09). The comparative disparity is calculated as follows: 11.26 percent African-American county residents, less 9.17 percent on the grand jury panels, times 100, divided by the 11.26 percent African-American county residents (11.26 - 9.17 x 100 ÷ 11.26 = 18.56). See United States v. Rogers, 73 F.3d 774, 776 n.1 (8th Cir. 1996) (method of calculating comparative disparity).

comparing grand jury pool composition and the county population is 4.59 percent, while the comparative disparity is 40.76 percent.[17]

To establish an equal protection violation under these circumstances, a criminal defendant must show the jury selection process "(1) resulted in a substantial underrepresentation of a suspect class to which [the defendant] belongs, . . . and (2) is susceptible to abuse or is not racially neutral." United States v. Warren, 16 F.3d 247, 251 (8th Cir. 1994) (citing Castaneda, 430 U.S. at 494); see Floyd v. Garrison, 996 F.2d 947, 949 (8th Cir. 1993) (same). Discriminatory purpose is an essential element of an equal protection challenge to grand jury selection, and merely showing systematic disproportion alone is insufficient in such a challenge. See Duren v. Missouri, 439 U.S. 357, 368 n.26 (1979).

The Missouri Supreme Court concluded there was no prima facie case of substantial underrepresentation shown, based on the absolute disparity between African-Americans on grand juries and in the county population. In reaching this conclusion, the Missouri Supreme Court referenced Castaneda, in which the United States Supreme Court found a substantial underrepresentation based on a forty percent absolute disparity

---

[17]The absolute disparity between African American county residents and African-American grand jury pool members is calculated as follows: 11.26 percent African-American county residents, less 6.67 percent African-American grand jury pool members (11.26 - 6.67 = 4.59). The comparative disparity is calculated as follows: 11.26 percent African-American county residents, less 6.67 percent African-American grand jury pool members, times 100, divided by 11.26 percent African-American county residents (11.26 - 6.67 x 100 ÷ 11.26 = 40.76).

between Hispanics in the county population and those summoned for grand jury service. See Castaneda, 430 U.S. at 495; Floyd, 996 F.2d at 950.

Petitioner's equal protection claim is based on numbers derived using a comparative disparity analysis. When this analysis is employed, the disparity appears much more significant than when the absolute disparity analysis is used. Petitioner fails to acknowledge that the forty percent disparity he relies on was calculated in a different manner than the forty percent disparity the Supreme Court found to violate equal protection in Castaneda. If the same method were used in this case, the maximum absolute disparity would be 4.59 percent.[18] Moreover, even assuming petitioner established unreasonable representation of African-Americans in the grand jury pool, he has failed to provide any evidence from which this Court could find that the grand jury selection process was susceptible to abuse or was not racially neutral. See Warren, 16 F.3d at 252 (equal protection claim failed where defendant failed to provide evidence of defective jury selection procedure or racially biased procedure); Floyd, 996 F.2d at 949 (plaintiff failed to establish equal protection violation as he did not show a discriminatory purpose in the jury-selection process). In contrast, in Castaneda the Supreme Court's conclusion was bolstered by the fact that the Texas "key-man" system of selecting jurors was found by the Court to be "highly subjective." 430 U.S. at 495, 497; see United States v. Garcia, 991 F.2d 489, 491-92 (8th Cir. 1993). Petitioner has not even provided information in the record as to how grand juries are selected in St. Louis County, much less "pointed to a defect in the process itself that serves to exclude African-Americans." Warren, 16 F.3d at 252. Consequently, there can be no equal protection violation under the Fifth and Fourteenth Amendments.

---

[18]See footnote 15, supra.

Thus, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Fourteen.

N. Claim Fifteen: Unconstitutional Application of Death Penalty.

Petitioner asserts as his fifteenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in overruling counsel's motion challenging the constitutionality of the Missouri death penalty statute. Petitioner states that the jury found the following aggravators: (1) the petitioner acted as an agent or employee and pursuant to the direction of others in killing Taylor; (2) the homicide involved depravity of mind and as a result was outrageously or wantonly vile, horrible or inhumane, and (3) Taylor was a potential witness in prosecutions involving Charles Shurn and Larry Shurn.[19]

---

[19]The trial court gave the following aggravating circumstances instruction, Instruction No. 23:

> In determining the punishment to be assessed the defendant for the murder of Charles Taylor, you must first unanimously determine whether one or more of the following aggravating circumstances exists:

First, petitioner argues jury Instruction No. 23 contains

1. Whether the defendant murdered Charles Taylor for the purpose of the defendant receiving money or any other thing of monetary value from Charles Taylor or another person.

2. Whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor.

3. Whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

4. Whether Charles Taylor was a potential witness in past or pending prosecutions of Charles Shurn and/or Larry Shurn in Federal Court and was killed as a result of his status as a potential witness.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

a vague statutory aggravator that cannot withstand constitutional challenge under Maynard v. Cartwright, 486 U.S. 356, 362 (1988), which holds that the constitution requires a jury instruction to limit and channel the sentencer's discretion in order to adequately minimize the risk of a wholly arbitrary and capricious sentencing decision. Petitioner also argues that Instruction No. 23 failed to comply with MAI-CR 3rd 313.40, which requires that when depravity is submitted alone, the instruction must continue with at least one of the phrases constituting depravity. Petitioner contends that this instruction caused jury confusion, as evidence by the jury's request during deliberations that the trial court define the term "depravity." Petitioner also argues that trial counsel was ineffective for failing to object to Instruction No. 23.

Second, petitioner states that as one aggravating circumstance, the jury found he had acted as an agent or employee of others in the killing of Taylor. Petitioner contends the lack of particularities in defining the terms "agent" or "employee" allowed the jury to find for death in an arbitrary and capricious manner, particularly as this conclusion was unsupported by any evidence presented at trial.

Third, petitioner challenges the Missouri Supreme Court's proportionality review as denying him due process. Petitioner states that the Missouri Supreme Court disposed of the question of proportionality by referring to other cases involving arguably similar circumstances in which the death penalty was imposed. Petitioner states that the statute does not direct the court to consider only cases in which the death penalty was imposed and upheld, as such an approach can only lead to an increasing pool of death-eligible cases. Petitioner argues that the Missouri Supreme Court should instead use the "frequency" approach, under which it would review cases with similar circumstances in which the defendants received life imprisonment, as well as similar cases where the defendant received the death penalty. Defendant asserts that under this

approach, the Missouri Supreme Court would then be able to determine whether the death penalty was being imposed sufficiently often to justify affirming the sentence under review.

Petitioner presented these issues to the Missouri Supreme Court, which addressed the issues as follows:

> Weaver's fifteenth point makes a four-pronged attack on the constitutionality of the death penalty. He claims it is unconstitutional because of (1) vagueness of the aggravating factor of "depravity of mind," (2) inadequacy of proportionality review, ...

Weaver claims the "depravity of mind" aggravating factor is excessively vague.

> We do not have to decide whether, in this case, the depravity of mind aggravating factor was excessively vague because the jury found two valid statutory aggravating circumstances under § 565.032.2(12). They found he murdered a potential witness and acted as an agent for another. We will affirm a death sentence based on the finding of one valid statutory aggravating circumstance, regardless of the failure of another. *State v. Sloan*, 756 S.W.2d 503, 509 (Mo. banc 1988), *cert. denied*, 489 U.S. 1040 (1989).
>
> The claim of unconstitutionality in the proportionality review must also fail. The constitution does not require proportionality review. Rather, it is required by statute. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1993); § 565.035, RSMo 1994. This Court has rejected the

> argument that it must engage in a statistical analysis of cases to determine whether the punishment is disproportional. *Ramsey*, 864 S.W.2d at 327-28. The Court's method of proportionality review does not violate Weaver's due process rights, his right to a fair trial or his right to be free from cruel and unusual punishment under the state or federal constitutions.

Weaver, 912 S.W.2d at 521-22.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924. The Missouri Supreme Court's factual findings are presumed to be correct, unless petitioner can show clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1); Kinder, 272 F.3d at 538.

1. Depravity of Mind Instruction.

The Missouri Supreme Court's determination with respect to the depravity of mind instruction is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied.

The depravity of mind instruction as given was unconstitutionally vague because it had no qualification to curb the jury's discretion. See Harris v. Bowersox, 184 F.3d 744, 749-50 (8th Cir. 1999), cert. denied, 528 U.S. 1097 (2000);

Sloan, 54 F.3d at 1384. Although the Missouri Supreme Court had limited the depravity of mind instruction prior to petitioner's trial, see State v. Preston, 673 S.W.2d 1 (Mo.) (en banc), cert. denied sub nom Preston v. Missouri, 469 U.S. 893 (1984), it did not apply that limiting construction in this case and refused to rely on depravity of mind in affirming the sentence. Instead, the Missouri Supreme Court relied on the jury's finding of two other valid aggravating circumstances, that petitioner murdered a potential witness and acted as an agent for another. Weaver, 912 S.W.2d at 522.

The use of the vague depravity of mind instruction on aggravating circumstances does not invalidate the sentence. The error is harmless because two other aggravating circumstances remain:

> [T]he sentencing process in Missouri does not involve a simple weighing of aggravating and mitigating circumstances. Once a single aggravating circumstance is found in Missouri, the factfinder is free to consider all the evidence to determine whether the death penalty is appropriate.

Sloan, 54 F.3d at 1385 (citing Stringer v. Black, 503 U.S. 222, 232 (1992) ("In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty")); see Harris, 184 F.3d at 749-50 (even if depravity of mind instruction was unconstitutionally vague, the penalty phase verdict was reliable beyond a reasonable doubt because the jury found other aggravating circumstances); Ramsey v. Bowersox, 149 F.3d 749, 754-55 (8th Cir. 1998), cert. denied, 525 U.S. 1166 (1999) (same). Therefore, the Court concludes that petitioner is not entitled to relief on this aspect of Claim Fifteen.

Petitioner's claim that his trial counsel rendered ineffective assistance by failing to object to Instruction No. 23 must fail because petitioner cannot establish he was prejudiced as a result. Strickland, 466 U.S. at 691. Petitioner cannot show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

2. Agency as an Aggravating Circumstance.

One of the three aggravating factors the jury relied upon in sentencing petitioner to death was "agency," i.e., that petitioner was acting at the direction of others in killing Taylor. Petitioner presented a claim to the Missouri Supreme Court that the "agent or employee of another person or persons" aggravating circumstance was vague and unsupported by the evidence. The state court implicitly rejected the claim, based on its conclusion that the agency aggravator was valid. See Weaver, 912 S.W.2d at 522. As a result, this Court will address the claim on its merits. See Coleman, 501 U.S. at 732-35 (in the absence of a clear and express statement declaring otherwise, an ambiguous state court decision is presumed to be made on the basis of the court's belief that federal law required such decision, thus permitting the federal habeas court to address the petition).

Petitioner contends the terms "agent" and "employee" are too vague and therefore allowed the jury to find for death in an arbitrary and capricious manner. The Missouri Supreme Court has stated that the agent/employee aggravating circumstance is "straightforward and easily understood." See State v. Blair, 638 S.W.2d 739, 758 (Mo.1982) (en banc). The Missouri Supreme Court's conclusion that the agency aggravator was valid is not contrary to and does not involve an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924.

Petitioner argues that agency was not established as there was no evidence presented that he acted as the agent of another, and therefore this aggravating factor is invalid. Petitioner's argument ignores the testimony of Robert "Dutch" Tabler, who testified that petitioner told him he was a "hit man," and that petitioner, along with Daryl Shurn, had killed Taylor because he was retaining certain real estate that belonged to the Shurns. There was evidence that petitioner knew Daryl Shurn, and Tabler also testified that petitioner knew Taylor was refusing to sign over real estate the Shurns wanted back. This testimony serves to support the jury's finding that petitioner acted as an agent of another person or persons and at their direction in murdering Taylor. The Missouri Supreme Court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Linehan, 315 F.3d at 924.

3. Inadequate Proportionality Review.

Petitioner contends that the manner in which the Missouri Supreme Court conducted a proportionality review of his death sentence violated his due process rights. The Supreme Court of the United States has held that the Eighth Amendment does not require a state appellate court to undertake a proportionality review. See Pulley v. Harris, 465 U.S. 37, 50-51 (1984). The Missouri legislature, however, has imposed a requirement for proportionality review of all Missouri cases where the death penalty is imposed. Mo. Rev. Stat. § 565.035. "While the review is not mandated by the federal Constitution, once in place it must be conducted consistently with the Due Process Clause." Kilgore v. Bowersox, 124 F.3d 985, 996 (8th Cir. 1997), cert. denied, 524 U.S. 942 (1998). The Missouri Supreme Court reviewed petitioner's case and concluded the sentence "when compared to similar cases, is neither excessive nor disproportionate." Weaver, 912 S.W.2d at 523. The Constitution does not require this Court to look behind that

conclusion to consider the manner in which the Missouri Supreme Court conducted its review. See Tokar v. Bowersox, 198 F.3d 1039, 1052 (8th Cir. 1999), cert. denied sub nom Tokar v. Luebbers, 531 U.S. 886 (2000); see also Ramsey, 149 F.3d at 754 (Missouri's proportionality review does not violate the Eighth Amendment, due process, or equal protection of the laws).

Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied on all aspects of Claim Fifteen.

O. Claim Sixteen: Adopting State's Findings.

Petitioner asserts as his sixteenth claim for relief that his sentence of death was imposed in violation of the Fifth and Fourteenth Amendments because the motion court hearing his Rule 29.15 motion failed to conduct an adequate review of the claims contained in his postconviction motion. Petitioner states that the motion court adopted verbatim the State's proposed findings, and thus failed to conduct an independent, thorough review of his claims, in violation of his due process rights.

The Missouri Supreme Court addressed this claim as follows:

> In his sixteenth point, Weaver argues that the judgment in the post-conviction hearing was invalidated because "most of the 'findings' either adopted verbatim or with only minor editorial changes [the state's] proposed findings." This Court's review is limited to determining whether the motion court clearly erred. *Rule 29.15(j).* While trial courts must act independently in making findings of fact and conclusions of law, it is not error for a trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings. The

point is denied.

State v. Weaver, 912 S.W.2d at 522.

Under § 2254, a federal court "[s]hall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Kenley, 228 F.3d 934 (quoting 28 U.S.C. § 2254). The law is well settled that "infirmities in the state's post-conviction remedy procedure cannot serve as a basis for setting aside a valid original conviction. . . . Errors or defects in the state post-conviction proceedings do not, *ipso facto*, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." Id. at 938 (quoting Williams, 640 F.2d at 143-44).

Petitioner's sixteenth claim for habeas relief asserts nothing more than an infirmity in the state's postconviction process. As such it is not cognizable in the instant § 2254 proceedings and will be denied.

P. Claim Seventeen: Acquittal First.

Petitioner asserts as his seventeenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because jury Instruction No. 16 emphasized the offense of first degree murder and created a substantial risk that the sentencer's decision would be for the greater charged offense, in violation of his due process rights and his right to be free from cruel and unusual punishment.

The Missouri Supreme Court addressed this claim as follows:

> Various claims are raised in his seventeenth through twenty-first points which have been argued and found to be without merit in recent cases before this Court. Specifically, Point XVII argues that our pattern instructions, which tell the jury "If you do not find the defendant guilty of murder in the first degree, you must consider whether or not he is guilty of murder in the second degree," is an "acquittal first" instruction and violates due process. This claim has recently been denied. *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994), *cert. denied* 513 U.S. 1093 (1995). . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

"As a general rule, jury instructions do not form a basis for habeas corpus relief." Williams v. Lockhart, 736 F.2d 1264, 1267 (8th Cir. 1984) (citations omitted). Federal habeas relief is available only when a petitioner establishes that improper instructions resulted in a "fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). "The burden of demonstrating that errors in jury instructions were sufficiently prejudicial to 'support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.'" Williams, 736 F.2d at 1267 (quoting Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). Petitioner "must show that the alleged error so infected the entire trial that he was deprived of his right to due process." Id. (citing Cupp v. Naughton, 414 U.S. 141, 147 (1973)).

Petitioner has not carried the heavy burden of

establishing that any alleged error in the instructions rose to the level of constitutional significance. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Seventeen.

Q. Claim Eighteen: Failure to Conduct Individual Voir Dire.

Petitioner asserts as his eighteenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in denying petitioner's motion for individual voir dire. Petitioner states that in his case, voir dire of the venire was conducted in panels of six venirepersons at a time. Petitioner asserts that because of this method of conducting voir dire, jurors heard prejudicial statements made by other venirepersons, and had there been individual voir dire, trial counsel would have been in a better position to thoroughly question the individual jurors regarding pretrial publicity.

The Missouri Supreme Court addressed this claim as follows:

> In Point XVIII Weaver argues that he was denied due process because individual voir dire was not allowed of the jurors. This Court has repeatedly rejected that claim. *Parker*, 886 S.W.2d at 921; *State v. Whitfield*, 837 S.W.2d 503, 509 (Mo. banc 1992); *State v. Ervin*, 835 S.W.2d 905, 917 (Mo. banc 1992). . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached

the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The Missouri Supreme Court has held that individual voir dire is not required in death penalty cases. See State v. Ervin, 835 S.W.2d 905, 917 (Mo. 1992) (en banc), cert. denied, 507 U.S. 954 (1993). In reviewing the method of voir dire examination conducted in cases tried before a state court, this Court's authority is "limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991); see Byrd v. Armontrout, 880 F.2d 1, 10 (8th Cir. 1989) (constitutionally permissible to question venire members in panels of twelve, and to conduct the death qualification process in panels of twelve), cert. denied, 494 U.S. 1019 (1990); see also Trujillo v. Sullivan, 815 F.2d 597, 606-07 (10th Cir.) (individual sequestered voir dire during death qualification is not constitutionally mandated), cert. denied, 484 U.S. 929 (1987). Based on this authority, there is no constitutional requirement for individual voir dire, and it is constitutionally permissible to conduct voir dire in panels of six jurors. "This procedure was within the trial court's discretion." State v. Guinan, 665 S.W.2d 325, 329 (Mo.) (en banc), cert. denied, 469 U.S. 873 (1984). The record contains no evidence that use of this procedure produced any prejudice.

Moreover, the trial court's conclusion that the jury was not prejudiced by remarks made during voir dire is a factual determination entitled to the statutory presumption of

correctness. 28 U.S.C. § 2254(d); Byrd v. Armontrout, 686 F. Supp. 743, 764 (E.D. Mo. 1990); aff'd, 880 F.2d 1 (8th Cir. 1989), cert. denied, 494 U.S. 1019 (1990). The Court's review of the record supports the conclusion that voir dire did not result in a partial jury. Based on the Court's own review of the voir dire record, the Court concludes the record is devoid of any evidence of a venireperson who was prejudiced by a fellow venireperson's prior knowledge of the case or other statement.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Eighteen.

R. Claim Nineteen: Separate Penalty Phase Jury.

Petitioner asserts as his nineteenth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in denying petitioner's motion to empanel a separate penalty phase jury. Petitioner states the motion should have been granted because he was entitled to be tried by a jury composed of jurors who were less likely to convict than those who had been exposed to the evidence improperly presented to the trial jury in violation of petitioner's constitutional rights. Petitioner asserts that "numerous evidentiary and constitutional errors" committed by the trial court allowed the jury to consider evidence and facts admitted in violation of petitioner's constitutional rights, and caused it to recommend a sentence of death.

The Missouri Supreme Court addressed this claim as follows:

> In his nineteenth point, Weaver claims that he should have a separate jury to determine punishment. This claim has also often been rejected by this Court. . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. The United States Supreme Court has held that allowing death-qualified juries to determine guilt does not violate any of a defendant's constitutional rights. Lockhart v. McCree, 476 U.S. 162 (1986); see McDowell v. Leapley, 984 F.2d 232, 233-34 (8th Cir. 1993) (rejecting contention that death-qualified jury is more likely to convict). The Missouri Supreme Court has long held that Missouri's statutory scheme, which provides for a single jury to determine guilt and punishment in a death penalty case, does not violate any constitutional protections. See, e.g., State v. Wise, 879 S.W.2d 494, 514 (Mo. 1994) (en banc), cert. denied, 513 U.S. 1093 (1995); State v. Roberts, 709 S.W.2d 857, 868 (Mo.) (en banc),

cert. denied, 479 U.S. 946 (1986). Moreover, this Court has found that the trial court's evidentiary rulings did not violate either a specific constitutional provision or petitioner's due process rights. Petitioner's contention that the jury considered evidence and facts admitted in violation of his constitutional rights in its sentencing deliberations is without support in the record.

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Moreover, the Court finds that the state supreme court's decision did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Id. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Nineteen.

S. Claim Twenty: Cautionary Instruction.

Petitioner asserts as his twentieth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the trial court erred in refusing to provide a cautionary instruction necessary to ensure that petitioner's sentence was not determined in an arbitrary and capricious manner. Petitioner asserts that the cautionary instruction would have insured that the jury was not prejudiced by the death qualification questions that were asked of them prior to the beginning of trial. Petitioner asserts that the cautionary instruction was needed because death qualification without proper explanation violated the presumption of innocence, and committed jurors to find petitioner guilty of first degree murder and to vote for death.

The Missouri Supreme Court addressed this claim as

follows:

> Weaver's twentieth claim is that the trial court erred in failing to give a non-MAI cautionary instruction. Again, that claim has been recently denied. *Parker*, 886 S.W.2d at 921; *State v. Kilgore*, 771 S.W.2d 57, 63 (Mo. banc 1989). . . . No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The Court begins its analysis with the Missouri Supreme Court's opinion. Because the Missouri Supreme Court reached the merits of petitioner's claim, its determination that petitioner's rights were not violated is entitled to deference. 28 U.S.C. § 2254(d). Petitioner is not entitled to relief unless he can demonstrate that the Missouri Supreme Court's resolution of the issue was contrary to clearly established federal law or involved an unreasonable application of that clearly established federal law. 28 U.S.C. § 2254(d)(1). See Linehan, 315 F.3d at 924.

The Missouri Supreme Court's determination is not contrary to clearly established federal law as determined by the Supreme Court of the United States, nor is it unreasonably applied. As stated above, the United States Supreme Court has held that allowing death-qualified juries to determine guilt does not violate any of a defendant's constitutional rights. Lockhart, 476 U.S. 162; McDowell, 984 F.3d at 234. Petitioner's claim that a cautionary instruction is required in order to protect his due process rights is premised on the theory that a death-qualified jury is inclined to find a criminal defendant guilty and to impose the death penalty. Lockhart squarely rejects that theory. Petitioner's proposed instruction indicated that death

qualification questions are mandatory and do not imply guilt.[20]

---

[20]The proffered instruction (Supp. L.F. at 74-75) stated:

> Ladies and Gentlemen of the jury, the process we are about to begin is known as voir dire. The attorneys for the State and the defendant will ask you questions regarding your qualifications to serve on this jury. You should understand that although it is your duty as a citizen to serve on juries, it is also your duty as a citizen not to serve on a jury if there is any reason whatsoever that you cannot do so in fairness to the State, the defendant or yourself. What is important is that you be as honest as you can be in your responses to questions put to you by counsel. You are not here to be judged and you will not be. It should not be an embarrassment to you in any way if you are excused from this case. Many of you will be. Many persons are excused in every case. It does not mean that you cannot serve on a future jury. If you are excused it will mean that you have been honest and forthright in your feelings and that is what we ask of you.
>
> This is a case in which the defendant, WILLIAM WEAVER, is charged with two [sic] counts of first degree murder. As in all first degree murder cases, one possible penalty is the death penalty. Because of that possibility, it is necessary that counsel ask you certain questions about your views regarding the death penalty. The death penalty is an issue as to which people have varying opinions. Some favor it. Some oppose it. There are strong arguments for either

The Missouri Supreme Court has rejected the claim that a non-MAI cautionary instruction is required to protect a capital murder defendant's due process rights, on the basis that MAI-CR 3d 300.02, which was read to the jury in this case as Instruction No. 4,[21] states that the charge of any offense creates

---

position. You will be asked your opinion and I would urge you to be as candid and honest as you can be in your answer.

The questions counsel will be asking you are asked in every case of first degree murder. The law requires that such questions be asked of you. The inquiry has no relation whatsoever to whether or not WILLIAM WEAVER is or is not guilty of the offense charged. As he sits before you he is presumed to be innocent. The State must prove his guilt to you beyond a reasonable doubt before you can find him guilty.

Since we will only have the opportunity to question yoou [sic] regarding your feeling about the death penalty at this state [sic] of the trial, before the State produces any evidence, I must caution you that you should not conclude that just because the attorneys ask you about a possible penalty that they believe WILLIAM WEAVER is guilty. It is simply a part of the jury selection process that occurs in every such case. Does everyone understand? Do you have any questions?

[21]Instruction No. 4 stated as follows:

The charge of any offense is not evidence, and it creates no inference that any offense was

no inference that any offense was committed or that the defendant is guilty, and that the defendant is presumed innocent until found guilty. See State v. Parker, 886 S.W.2d 908, 921 (Mo. 1994) (en banc).

Petitioner has not established that the Missouri Supreme Court's decision with respect to this issue resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme

---

committed or that the defendant is guilty of an offense.

The defendant is presumed to be innocent unless and until, during your deliberations upon your verdict, you find him guilty. This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leave you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

L.F. at 118.

Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Twenty.

T. Claim Twenty-One: Reasonable Doubt Instructions.

Petitioner asserts as his twentieth claim for relief that his sentence of death was imposed in violation of the Fifth, Eighth and Fourteenth Amendments because the reasonable doubt instructions given by the trial court, Instruction Nos. 4 and 20, did not contain language sufficient to protect his due process rights and the constitutional prohibition against cruel and unusual punishment.[22] Petitioner states that the language of

---

[22]See footnote 19, supra, for the text of Instruction No. 4. Instruction No. 20 read as follows:

> The law applicable to this stage of the trial is stated in these instructions and instructions numbered 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.
>
> You must not single out certain instructions and disregard others or question the wisdom of any rule of law.
>
> The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.
>
> In these instructions, you are told that in order to consider the death penalty, you must find

these instructions suggests a higher degree of doubt than is constitutionally required for acquittal and a punishment other than death. Petitioner asserts that the statement the law does not require proof which "overcomes every possible doubt" could have caused a reasonable juror to interpret the instructions to allow a finding of guilty and punishment of death based on a degree of proof below that required by law.

The Missouri Supreme Court addressed this claim as follows:

> Finally, Weaver challenges the instruction on reasonable doubt. This complaint has been

---

> beyond a reasonable doubt certain propositions relating to aggravating circumstances. The burden of causing you to find these propositions beyond a reasonable doubt is upon the state.
>
> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

L.F. at 139.

> presented and denied on numerous occasions. No precedential value would be served by further discussion of [this point]. *See Rule 84.16.*

State v. Weaver, 912 S.W.2d at 522.

The State argues that this claim is Teague-barred.[23] The Eighth Circuit has addressed similar challenges to Missouri's reasonable doubt instruction, and in most instances has concluded the challenges are Teague-barred. See, e.g., Ramsey, 149 F.3d at 757-78; Murray, 34 F.3d at 1382. In a more recent opinion, the claim was not Teague-barred because the petitioner based his challenge on Supreme Court precedent that was established before his conviction became final. See Harris, 184 F.3d at 750-52. In Harris, the Eighth Circuit examined the language petitioner challenges here and found it does not unconstitutionally weaken the reasonable doubt standard. See Harris, 184 F.3d at 750-52 (Missouri reasonable doubt instruction "adequately conveyed the jury's obligation that it could convict [petitioner] only upon finding him guilty beyond a reasonable doubt.").

Based on the foregoing precedent, the Court need not decide whether petitioner's claim is Teague-barred. In either case, petitioner has not established that the Missouri Supreme Court's decision with respect to this issue was contrary to or involved an unreasonable application of clearly established

---

[23]"In Teague v. Lane, a plurality of the United States Supreme Court held that as a general rule, habeas corpus petitioners cannot gain the benefit of a new rule of constitutional procedure unless the rule is dictated by precedent existing at the time the petitioner's conviction became final. 489 U.S. 288, 301 (1989)." Harris v. Bowersox, 184 F.3d 744, 750 n.5 (8th Cir. 1999).

federal law, as determined by the Supreme Court of the United States. Linehan, 315 F.3d at 924. Therefore, petitioner's § 2254 petition for habeas corpus relief should be denied with respect to Claim Twenty-One.

Request for Evidentiary Hearing.

"A section 2255 petition can be dismissed without an evidentiary hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusory." Evans v. United States, 220 F.3d 549, 551 (8th Cir. 2000).

Petitioner requests an evidentiary hearing on his petition for writ of habeas corpus. Petitioner does not specify what facts he seeks to prove. Because the instant petition was filed after the enactment of the AEDPA, its provisions govern the standards for evidentiary hearings. See Weaver, 241 F.3d at 1029. "A habeas petitioner is entitled to an evidentiary hearing under circumstances narrowly circumscribed by the provisions of 28 U.S.C. § 2254(e)(2)." Johnston v. Luebbers, 288 F.3d 1048, 1058 (8th Cir. 2002), cert. denied sub nom Johnston v. Roper, 123 S. Ct. 983 (2003). This section provides "that where a habeas petitioner 'has failed to develop the factual basis of a claim in State court proceedings,' the district court cannot hold an evidentiary hearing unless the petitioner shows that his case falls within one of two exceptions." Id. "[T]he initial inquiry must be whether the petitioner failed to develop his claim in state court. A petitioner cannot be said to have failed to develop relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings." Id. (internal punctuation and citation omitted).

This Court concludes petitioner has not shown that any claim of the petition requires further evidentiary development

for its resolution. Petitioner has failed to demonstrate that an evidentiary hearing is warranted under the applicable standards set forth in 28 U.S.C. § 2254(e)(2). Accordingly, petitioner's request for an evidentiary hearing will be denied.

VI. Conclusion and Certificate of Appealability.

For the reasons stated above, the Court finds that petitioner William Weaver is entitled to a writ of habeas corpus vacating his sentence of death on the ground presented in portions of Claim Two: that the prosecutor's improper penalty phase closing argument violated petitioner's due process rights. The Court finds that all other claims for habeas relief are either procedurally barred or fail on the merits, and must be denied.

Under 28 U.S.C. § 2253, as amended by the AEDPA, "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). "When a district court dismisses the petition based on procedural grounds without reaching the prisoner's underlying constitutional claim," a certificate of appealability should issue when the prisoner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id..

Upon careful review of the record, the Court finds petitioner has not demonstrated that reasonable jurists would (1) find the Court's assessment of the constitutional claims debatable or wrong; or (2) would find it debatable whether the Court was correct in its procedural rulings, and therefore the Court does not reach the issue whether reasonable jurists would

find it debatable that the petition states a valid claim of the denial of a constitutional right. See Slack, 529 U.S. at 484-85. The Court therefore concludes petitioner is not entitled to a certificate of appealability on his other claims.

Accordingly,

IT IS HEREBY ORDERED that petitioner William Weaver's First Amended Petition for Writ of Habeas Corpus is **GRANTED** as to the sentence of death only, based on portions of Claim Two as discussed above, and **DENIED** in all other respects. Weaver's death penalty is vacated, and he must either be sentenced to life in prison without the possibility of parole or must be given a new trial on the state's request for the death penalty. [Doc. 15]

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability.

An appropriate judgment will accompany this memorandum and order.

CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 7th day of May, 2003.

Supreme Court, U.S.
FILED
06-313 AUG 29 2006
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX TO PETITION
VOL. II OF II

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-3825

Attorneys for Petitioner

TABLE OF CONTENTS

Opinion in William Weaver v. Michael Bowersox, Nos. 03-2880/2938 (8th Cir. February 16, 2006 (corrected February 23, 2006)) A-2

Memorandum & Order in William Weaver v. Michael Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003) A-23

Opinion in William Weaver v. Michael Bowersox, No. 99-3462 (8th Cir. February 23, 2001) A-187

Memorandum & Order in William Weaver v. Michael Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9, 1999) A-203

Order Denying Rehearing and Rehearing En Banc in William Weaver v. Michael Bowersox, Nos. 03-2880/2938 (8th Cir. May 31, 2006) ... A-220

Opinion of the Missouri Supreme Court in State v. Weaver, No. 71051 (Mo. banc Dec. 19, 1995) A-221

Findings of Fact and Conclusions of Law in William L. Weaver v. State of Missouri, No. 603615 (St. Louis County Circuit Court Nov. 29, 1994) 258

Transcript of penalty phase closing argument in State of Missouri v. William L. Weaver, No. 565118B .. 274

Penalty phase jury instructions in State of Missouri v. William L. Weaver, No. 565118B (St. Louis County Circuit Court) 299

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3462

William Weaver,	*
	*
Petitioner-Appellee,	*
	*Appeal from the United States
v.	*District Court for the Eastern
	*District of Missouri
Michael Bowersox,	*
	*
Respondent-Appellant*	

Submitted: June 13, 2000
Filed: February 23, 2001

Before BOWMAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

BYE, Circuit Judge.

The State of Missouri appeals from the judgment of the district court granting William Weaver's petition for habeas corpus relief under 28 U.S.C. § 2254. The district court determined that Weaver's Fourteenth Amendment rights under the Equal Protection Clause were violated when the state prosecutor exercised two peremptory strikes against black venirepersons during Weaver's murder trial. We reverse; we also remand to the district court to address the remaining twenty-one issues raised in Weaver's petition.

BACKGROUND

On July 19, 1988, a St. Louis County jury convicted Weaver, a black male, of first-degree murder for the death of Charles Taylor. The following day the jury sentenced Weaver to death.

During jury selection, the prosecutor exercised seven of his nine peremptory strikes on white venirepersons and the remaining two on black venirepersons, leaving a jury comprised of nine whites and three blacks. Weaver challenged the two strikes against black venirepersons, relying upon the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The state trial court held a hearing at which the prosecutor explained his peremptory strikes by stating

> there's not a pattern of discrimination or systematic exclusion. There are three blacks on the jury, which is 25% of the jury, which I think is significantly higher than the black population in St. Louis County.
>
> The two blacks I struck with my peremptory strikes were not because the people were black but for other reasons. Let's see. Juror number 27, Ms. Burns, I struck her for a number of reasons: One, in the death penalty phase, although she said she could impose the death penalty, I wasn't persuaded that she could. I thought she said it with some reluctance and some hesitation. I also couldn't maintain eye contact with her. I know bad vibrations and bad chemistry between a lawyer and a prospective juror doesn't carry great weight with the Court or, at least, the Court of Appeals, but I think it's a legitimate

reason for the attorney to strike someone.

In any event, I was not persuaded that she could give the death penalty, particularly to a fellow black person. I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her, Mr. Innman, who I have left on the jury by way of my strikes. And I simply felt that she would not be a fair and impartial juror.

With regard to juror number 54, Ms. Newsome, I felt that she was a weak person, both during voir dire on the death penalty, and on the voir dire-just the general voir dire, although Ms. Black conducted most of it. My impression of her was that she was not particularly bright and I struck a couple of white people for that very same reason. I thought in a case like this I needed intelligent people. I didn't figure she qualified in that regard and I thought she took the whole matter rather frivolously.

But in any matter, Judge, of nine peremptory strikes, I have used only two to strike blacks. Seven were used to strike whites. I have left three blacks on the jury, even though I have enough peremptory strikes to attempt to remove all five.

...

Perhaps I misstated my case somewhat with Ms. Newsome when I say intellectually weak. What I really meant is her personality struck me-granted, she did try hard to get on the jury, which showed civic minded interest; but in

> those interviews with the Court, she just struck me as a person that was a weak personality where the death penalty is involved, and I didn't think she would be able to vote for the death penalty.

In evaluating the Batson claim, the state trial court observed that three of the jurors remaining on the panel were black, and also that the alternate juror was black. The trial court denied the Batson challenge stating that, "the court does find that no prima facie showing of discrimination in the jury selection has been made."

Weaver brought post-conviction motions for relief in state court, which were denied. He also appealed his conviction and sentence to the Missouri Supreme Court. Weaver's direct appeal was consolidated with his appeal from the denial of his post-conviction motions. On December 19, 1995, the Missouri Supreme Court affirmed the conviction and death sentence. See State v. Weaver, 912 S.W.2d 499 (Mo.1995).

The Missouri Supreme Court analyzed the Batson claim differently than the trial court. Rather than reviewing the trial court's determination that the defendant had not established a prima facie showing of discrimination, on appeal the court focused on whether the prosecutor had offered race-neutral explanations for his peremptory strikes. The Missouri Supreme Court concluded that the prosecutor's stated reasons for striking venireperson Burns were race-neutral, and that no Batson violation occurred.

> What a prosecutor observes about a potential juror in voir dire, as well as what is said, may form a legitimate nondiscriminatory basis for exercising a peremptory strike. See Purkett, _____ U.S. _____, 115 S.Ct. at 1771. Those

> observations here included reluctance and hesitation in answering questions, lack of eye contact with the prosecutor, lack of strength, and "cutting up" and talking during voir dire. The prosecutor's explanation here was specific, race-neutral, and free of any racially discriminatory purpose. The trial court had the opportunity to observe the juror in question, listen to the manner in which she answered the questions, and to assess the prosecutor's demeanor and reasons for striking the juror.

Weaver, 912 S.W.2d at 509.

The Missouri Supreme Court also concluded that no Batson violation occurred with respect to venireperson Newsome:

> As to [Newsome], the state's reason for striking her was race neutral. By her words and conduct, [Newsome] led the prosecutor to believe that she was frivolous, had a weak personality or was intellectually weak, particularly where the death penalty was concerned. It is not inherently pretextual to say that in a capital case a prosecutor would want serious jurors that are of above average intelligence and not reluctant to impose the death penalty when appropriate.

Id. at 509-10.

PROCEDURAL HISTORY

On April 18, 1996, Weaver filed a pro se habeas corpus petition in federal district court. At that time, Weaver had not yet petitioned the United States Supreme Court for review of

the Missouri Supreme Court's decision affirming his conviction and death sentence. The district court dismissed Weaver's petition without prejudice so that he could fully exhaust his state remedies. Weaver petitioned the Supreme Court for a writ of certiorari, which the Court denied on October 7, 1996. Weaver v. Missouri, 519 U.S. 856, 117 S.Ct. 153, 136 L.Ed.2d 98 (1996).

On November 12, 1996, Weaver filed a second pro se habeas corpus petition in federal court. After the district court appointed counsel to assist Weaver in presenting his petition, Weaver filed an amended petition raising the Batson claim and twenty-one other issues.

Weaver's two petitions straddled the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (AEDPA) (effective April 24, 1996), which set new standards that curtail the federal courts' review of constitutional challenges to state custody. See generally, Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1518, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring, writing for five Justices on this point).

On August 9, 1999, the district court granted Weaver a writ of habeas corpus. The district court held that the state trial court improperly applied Batson's three-step process for analyzing a prosecutor's use of peremptory strikes.[1] Citing

---

[1]Batson 's three-step process first requires the defendant to make a prima facie showing that the prosecution exercised one or more peremptory challenges based on race. Second, after a prima facie showing is made, the burden shifts to the prosecutor to give a racially neutral explanation for the challenge. Third, the trial court must decide whether the defendant has established purposeful discrimination. See

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), the district court decided that the state trial court applied Batson unreasonably-instead of considering whether the prosecutor's articulated reasons for the peremptory strikes were race neutral, the state trial court merely found that the defendant had made no prima facie showing. Hernandez holds that a defendant's prima facie requirement becomes moot if a prosecutor offers a race-neutral explanation before the court rules that the defendant made a prima facie showing. See Hernandez, 500 U.S. at 359, 111 S.Ct. 1859.

In addition, the district court independently analyzed the prosecutor's stated reasons for striking venireperson Burns. The district court found that the prosecutor struck Burns for reasons which were not race neutral.

The district court did not specifically address whether Weaver's petition should be analyzed under AEDPA, concluding that a Batson violation had occurred even if the state trial court's actions were examined under the heightened standard. In addition, the district court addressed only the state trial court's decision, and did not consider whether the Missouri Supreme Court decision was contrary to, or involved an unreasonable application of Batson. After granting Weaver a writ based upon the Batson claim, the district court declined to address Weaver's remaining twenty-one claims.

DISCUSSION

I. Application of AEDPA

As a threshold matter, we must decide whether AEDPA, and its new standard of review, applies to Weaver's habeas

---

Batson, 476 U.S. at 96-98.

petition. Weaver asks us to apply the pre-AEDPA standard. He filed his first petition on April 18, 1996, six days before AEDPA took effect. That petition was dismissed without prejudice for failure to exhaust state remedies. After exhausting state remedies, Weaver returned to federal court on November 12, 1996. He notes that, under pre-AEDPA law, the second filing constituted a mere continuation of the first filing, because the first was not adjudicated on the merits. See Sanders v. United States, 373 U.S. 1, 17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). Thus he argues that the standard in effect when he filed his first petition applies.

We disagree, AEDPA's provisions apply to all habeas corpus petitions filed after the Act's effective date. Lindh v. Murphy, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). We hold that this rule applies even when a prisoner's original petition was filed prior to AEDPA's effective date and dismissed without prejudice for failure to exhaust state remedies. See Barrientes v. Johnson, 221 F.3d 741, 751 (5th Cir.2000); see also Mancuso v. Herbert, 166 F.3d 97, 101 (2nd Cir.1999).

Weaver's argument proves a different point. We agree that Weaver's second, post-AEDPA filing isn't a second or successive petition. See Slack v. McDaniel, 529 U.S. 473, 484-87, 120 S.Ct. 1595, 1604-05, 146 L.Ed.2d 542 (2000). But "whether a petition is a 'second or successive' application under the AEDPA is an entirely different question" than whether AEDPA applies to a petition filed after the Act's effective date. Mancuso, 166 F.3d at 101 n. 4; see Barrientes, 221 F.3d at 751 ("Whether the petition at issue will be considered 'second or successive' within the meaning of the Act is immaterial to the analysis"). For present purposes, then, the question is whether AEDPA applies; we hold that it does because Weaver's petition was filed after AEDPA's effective date.

II. Standard of Review

A state prisoner may seek a writ of habeas corpus in federal court if his confinement violates the federal Constitution or federal law. 28 U.S.C. § 2254(a). Under AEDPA, a federal court may grant such a writ only if the state court proceedings

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d)(1) & (2).

Section 2254(d) distinguishes between two types of erroneous decisions-those of law and those of fact-and treats each in separate subparagraphs. Claims of legal error, whose review is governed by § 2254(d)(1), admit of even finer gradations. See Williams, 120 S.Ct. at 1519-20, 120 S.Ct. 1495 (delineating four separate categories of § 2254(d)(1) cases). Claims of factual error are subjected to the standard enunciated in § 2254(d)(2); section 2254(e)(1) then establishes a presumption of correctness in favor of state court findings of fact.

As a preliminary matter, then, we must identify the particular statutory provision that governs Weaver's case. Weaver challenges the state court's disposition of his Batson claim. We have held that each of the three steps of the Batson inquiry involves a determination of fact. See United States v. Moore, 895 F.2d 484, 485 (8th Cir.1990) (step one: prima facie

showing); Shurn v. Delo, 177 F.3d 662, 665 (8th Cir.1999) (step two: prosecutor's race-neutral explanations); United States v. Fuller, 887 F.2d 144, 146 (8th Cir.1989) (step three: court's ultimate finding on purposeful discrimination). Because Weaver's challenge necessarily involves a question of fact, we must review his claim under § 2254(d)(2). Accordingly, our review presumes that the Missouri courts found the facts correctly, unless Weaver rebuts that presumption with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). It bears repeating that even erroneous fact-finding by the Missouri courts will not justify granting a writ if those courts erred "reasonably." Cf. Williams, 120 S.Ct. at 1522, 120 S.Ct. 1495 (discussing the meaning of the word "unreasonable" as employed in § 2254(d)(1)).

III. The Batson Claim

A. The State Trial Court Decision

The state trial court rejected Weaver's Batson challenge, explaining that "no prima facie showing of discrimination in the jury selection has been made." We regularly defer to the fact-findings of trial courts because those courts are uniquely positioned to observe the manner and presentation of evidence. Our deference to trial court fact-finding is doubly great in the present circumstance because of the "unique awareness of the totality of the circumstances surrounding voir dire," Moore, 895 F.2d at 486, and because of the statutory restraints on the scope of federal habeas review.

First, a trial court's determination of the Batson prima facie step is highly fact-intensive. The determination is based largely upon information "that will not be evident from a reading of the record," such as the ability to "evaluate general demeanor; to observe attention span, alertness, and interest; and to assess reactions indicating hostility or sympathy towards or

fear of the parties." Id. at 485-86. Second, on habeas review, we accord state trial courts broad latitude in determining questions of fact by virtue of the statutory presumption in favor of state court fact-findings, see 28 U.S.C. § 2254(e)(1).

Weaver's showing falls short of rebutting the presumptive correctness of the state trial court's determination that Batson wasn't violated. Weaver points to the fact that the state trial court's express findings were limited to comments about the racial composition of the jury-a "numbers analysis." He directs us to our earlier precedent that a numbers analysis cannot, on its own, negate a prima facie case. See United States v. Johnson, 873 F.2d 1137, 1139-40 (8th Cir.1989). But Weaver advances no additional support for his claim that the state trial court determined the facts "unreasonably" in light of the totality of the evidence presented. See 28 U.S.C. § 2254(d)(2).

Contrary to Weaver's assertions, we believe that the district court's numbers analysis entails precisely the opposite conclusion. Our early Batson cases (decided during roughly the same time period as the instant state court decision) suggest that a numbers analysis is relevant in determining whether a defendant has established a prima facie case. E.g., Moore, 895 F.2d at 486 n. 5; United States v. Fuller, 887 F.2d 144, 146 (8th Cir.1989). Of course, the trial court's decision does not stand or fall on a numbers analysis alone. The state trial judge personally observed the venirepersons' demeanor during voir dire, and doubtless developed a sense for those their acumen. Likewise, the state trial judge personally observed the prosecutor during the exercise of peremptory strikes, and later when he explained his conduct.

In addition, we agree with the State of Missouri's contention that Weaver failed to provide additional evidence at the Batson hearing to establish a prima facie case. Weaver argued only against the weight of the race-neutral reasons

proffered by the prosecutor, without demonstrating that the prosecutor's reasons were pretextual.

In sum, the trial court's use of numbers analysis (a relevant factor), coupled with the court's unique opportunity to observe the entirety of voir dire, coupled with Weaver's failure to provide additional evidence at the Batson hearing, supports the state trial court's decision to deny Weaver's Batson claim. See Luckett v. Kemna, 203 F.3d 1052, 1054 (8th Cir.2000). Weaver has failed to overcome the statutory presumption of correctness afforded the state court's fact-finding. Because he cannot denigrate the state trial court's factual determinations, we cannot conclude that the state trial court's decision was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).[2]

---

[2]The district court concluded that Weaver's petition raised a § 2254(d)(1) challenge, namely, the state trial court's "unreasonable application of" Batson. The district court faulted the state trial court for analyzing the alleged violation under step one of the Batson analysis (prima facie showing), instead of moving to step two when the prosecutor gave race-neutral explanations for striking the black venirepersons. The district court erred in this respect. Weaver's petition raised Batson claims, which require factual determinations. As we explained above, § 2254(d)(2) governs federal review of state court factual determinations.

Even if subsection (d)(1) had applied, however, the district court's analysis was flawed. Weaver was tried in July 1988, nearly three years before the Supreme Court decided Hernandez v. New York, which holds that a defendant's prima facie showing is mooted when the prosecutor explains his strikes before the court can rule on the prima facie step. 500 U.S. at 359, 111 S.Ct. 1859. The state trial court can hardly be

B. The Missouri Supreme Court Decision

We also examine the Missouri Supreme Court's decision because it was based on different grounds than the state trial court decision. Cf. Ward v. French, 989 F.Supp. 752, 761 (E.D.N.C.1997) (addressing the presumptive correctness of factual findings made by both a state trial court and the North Carolina Supreme Court). The Missouri Supreme Court did not review the trial court's prima facie determination, but instead made its own express factual finding that the prosecutor gave race-neutral explanations for his two peremptory strikes. See Weaver, 912 S.W.2d at 509.

Findings of fact made by state appellate courts have the same presumptive correctness as findings of fact made by state trial courts. Cf. Sumner v. Mata, 449 U.S. 539, 546-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (applying the pre-AEDPA version of 28 U.S.C. § 2254(e)(1)); Jones v. Jones, 938 F.2d 838, 842-43 (8th Cir.1991) (citing Sumner v. Mata and addressing findings of fact made by Missouri appellate courts on a Batson claim).

As with the state trial court's fact-finding, Weaver has failed to rebut the presumptive correctness of the Missouri Supreme Court's determination that the prosecutor gave race-neutral reasons for striking two venirepersons. The only point that bears elaboration is the prosecutor's comment that

---

faulted for failing to follow a Supreme Court decision that didn't exist at the time of Weaver's murder trial. Cf. Luckett, 203 F.3d at 1053 & 1055 n. 8 (involving habeas review of a pre-Hernandez Batson decision, declining to apply the Hernandez rule, and analyzing the state court's decision under step one of Batson instead).

"[i]n any event, I was not persuaded that [Burns] could give the death penalty, *particularly to a fellow black person.*" (Emphasis added). Weaver argues that this statement is racially discriminatory on its face, and requires a finding of a Batson violation. The Missouri Supreme Court held that this comment did not violate Batson because it was clear that the "prosecutor's decision to strike B[urns] was *not based solely upon race* or upon any assumptions about persons of [Burns's] race but was based upon the way she behaved and answered questions, that is, hesitation, lack of eye contact, flippancy and other intangibles observed only by those present in the courtroom." Weaver, 912 S.W.2d at 509 (emphasis added).

The Missouri Supreme Court's analysis is consistent with the dual motivation analysis that we have recognized. See United States v. Darden, 70 F.3d 1507, 1531 (8th Cir.1995). In Darden, we rejected a Batson claim where the prosecutor gave several race-neutral reasons for striking a venireperson before adding one reason that was discriminatory. The district court did not expressly find that the prosecutor's peremptory strike was based solely on the race-neutral reasons, but said "the other reasons you expressed give cause that are ··· racially neutral-the other reasons you stated. . . For that reason I'm allowing the strike··· [T]he other reasons you gave give the basis for being a strike." Id. (quoting the trial transcript). We held that the district court's decision "was equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive." Id. (emphasis added).

Here, the Missouri Supreme Court found that the peremptory strike "was based" upon the several race-neutral reasons given by the prosecutor. Weaver, 912 S.W.2d at 509. That decision, as in Darden, is equivalent to a finding (and necessarily implies) that the prosecutor would have exercised the strike even if he hadn't expressed a facially discriminatory motive. Thus, we find no "unreasonable" error in the Missouri

Supreme Court's factual determination. See 28 U.S.C. § 2254(d)(2); cf. Williams, 120 S.Ct. at 1522, 120 S.Ct. 1495.

IV. The Remaining Claims

After determining that a Batson violation occurred, the district court failed to address the remaining twenty-one issues raised by Weaver in his petition. We have instructed district courts to decide *all* issues raised in a habeas petition, particularly in death penalty cases, on the grounds that "the allowance of piecemeal litigation cannot possibly serve the interests of society, the defendant or the crime victim." Hulsey v. Sargent, 15 F.3d 115, 119 (8th Cir.1994). On remand, the district court must address all of Weaver's remaining claims at the same time, regardless of their disposition.

CONCLUSION

For the reasons stated above, we reverse and remand for further proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

Because the prosecutor's open admission that he based his decision to strike Ms. Burns partly upon her race constitutes direct evidence of unconstitutional discrimination, the state trial court was, in my view, required to make an inquiry into whether the prosecutor would have made the same decision absent the illegal animus. The state trial court never made the necessary finding on this crucial factual matter, however, nor did the Missouri Supreme Court, because it applied the wrong legal standard. The Supreme Court of Missouri merely held that "the prosecutor's decision to strike [Ms. Burns] was not based *solely* on race or upon any assumptions about persons of [her] race," Weaver, 912 S W.2d at 509 (emphasis supplied). This holding begs the question because the relevant issue is not whether the

prosecutor based his strike solely on race, but whether he would have stricken Ms. Burns had race not been a motivation. See Darden, 70 F.3d at 1531-32. I believe that this legal error involved at the very least an unreasonable application of Batson.

I also think, moreover, that the district court erred in holding, essentially, that it would be unreasonable to find on the record before the state trial court that the prosecutor would have made the same decision absent the unconstitutional animus. For that reason, I would remand to the district court with directions to issue a writ of habeas corpus ordering Mr. Weaver's release unless within 120 days the state court makes a finding in accordance with the principles laid down in *Batson*. *See Coulter v. Gilmore*, 155 F.3d 912, 922 (7th Cir.1998). In other words, on remand, the state court would be obliged to decide whether the prosecutor would have stricken Ms. Burns but for her color. If he would not have, Mr. Weaver would be entitled to relief.

I therefore respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-2220 CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the court on petitioner William Weaver's (Weaver) First Amended Petition for Writ of Habeas Corpus filed on June 27, 1997.

I. BACKGROUND

A. Facts.

Weaver, an African-American male, was convicted for the first degree murder of Charles Taylor.[1] State of Missouri v. Weaver, 912 S.W.2d 499, 507 (Mo. 1995). As set out by the Missouri Supreme Court, the facts are as follows. On July 6, 1987, Weaver and his co-defendant Daryl Shurn entered Taylor's apartment with the intent to kill him. Id. Taylor brandished a gun and successfully escaped from the apartment.

---

[1]Daryl Shurn, Weaver's co-defendant, was also convicted for murdering Mr. Taylor. State v. Missouri v. Shurn, 866 S.W.2d 477 (Mo. 1993).

Id. Weaver and Shurn chased Taylor and fired several s hots at him. Taylor escaped into a wooded area, but fell due to wounds he had suffered. Id. Weaver and Shurn briefly left the woods to return to their automobile. Weaver went back into the wooded area in which Taylor had fallen and shot him again. Taylor subsequently died from multiple gunshot wounds to the head. Id. Weaver and Shurn fled the murder scene in their car. The incident was immediately reported to police by witnesses at the scene. Id. at 508. Police soon spotted the vehicle and began to chase it. Id. After crashing, Weaver and Shurn fled on foot. Id. Shurn was captured at the scene of the crash, but police had to chase Weaver into a nearby apartment complex. Weaver was eventually caught and placed under arrest. Police then returned him to the scene of the crash, where one of the original pursuing officers identified Weaver as the man who had fled. Id.

B. Procedural History

In 1988, petitioner Weaver was tried, convicted, and sentenced to death in the Circuit Court of St. Louis County, Missouri in the case styled State of Missouri v. William Weaver, Cause No. 565118B. Weaver appealed this conviction directly to the Missouri Supreme Court, Weaver, 912 S.W.2d 499 (Mo. 1995). Proceeding pro se, Weaver also filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. He subsequently filed an amended Rule 29.15 motion. The court conducted an evidentiary hearing on the Rule 29.15 motion from September 13, through September 15, 1993. A subsequent hearing was held on July 28, 1994. On November 29, 1994, the Circuit Court of St. Louis County, Missouri denied relief on all grounds. Weaver then appealed the denial of his Rule 29.15 motion to the Missouri Supreme Court.

Weaver's appeal from the order denying his Rule 29.15

motion was consolidated with his direct appeal pursuant to Missouri Rule 29.15(1). The Missouri Supreme Court affirmed Weaver's conviction, sentence and the denial of post-conviction relief on January 23, 1996. Weaver, 912 S.W.2d at 523. Weaver filed a pro se Petition for Writ of Habeas Corpus on April 18, 1996. This court issued a May 3, 1996, Order stating it would dismiss without prejudice Weaver's Habeas Corpus if he filed for a Writ of Certiorari. On June 21, 1996, Weaver filed for a Writ of Certiorari and this Court dismissed his petition without prejudice on July 1, 1996. After the United States Supreme Court denied his Writ of Certiorari, Weaver filed a Petition for Writ of Habeas Corpus with this Court on November 12, 1996. Upon being appointed counsel, Weaver filed the First Amended Petition for Writ of Habeas Corpus which is now before the Court.

II. DISCUSSION

Weaver's petition for relief alleges that his trial and conviction in Missouri state court violated the guarantees of the United States Constitution on twenty-two (22) grounds. Respondent, the Superintendent of Potosi Correctional Center, asserts that Weaver's claims are either procedurally defaulted or have no merit. Although not filed as a separate motion, Weaver seeks an evidentiary hearing on his amended petition. In light of the following analysis, this request will be denied as moot.

A. Ground for Relief.

In support of his First Amended Petition for Writ of Habeas Corpus, Weaver asserts the following grounds for relief:

1. Batson Violation
2. Improper Guilt and Penalty Phase Closing Arguments by the Prosecutor

3. Prosecuting Attorney's Investigator Posing as a Juror
4. Brady Violation - Prosecutor's Failure to Completely Disclose Agreement with Witness
5. Brady Violation - Undisclosed Police Dispatch Tape
6. Brady Violation - Undisclosed Description of Suspect
7. Admission of Hearsay Evidence - Confrontation Clause Errors
8. Denial of Rule 29.15 Discovery
9. Autopsy Hearing
10. Ineffective Assistance of Counsel
11. Supplemental 29.15 Motion
12. Inadmissible Identifications
13. Unconstitutional Search
14. Grand Judy Race Discrimination
15. Unconstitutional Application of Death Penalty
16. Adopting State's Findings
17. Acquittal First
18. failure to Conduct Individual Voir Dire
19. Separate Penalty Phase Jury
20. Cautionary Instruction
21. Reasonable Doubt Instruction
22. Additional Procedural Information

B. Scope of Review.

The President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA) on April 24, 1996. Pub.L. No. 104-132, 110 Stat. 1214, 1218-21 (1996). The AEDPA revised 28 U.S.C. §2254 to limit the scope of review a federal court can apply to analysis of an application for habeas corpus relief:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

AEDPA at §104(3) (codified at 28 U.S.C. §2254(d)).

The parties disagree on whether the scope of review stated in the amended version of §2254 applies to this case. Respondent contends the AEDPA's "new, highly deferential standard for evaluating state court rulings," should apply in this case. Lindh v. Murphy, 117 S.CT. 2059, 2066 n.7 (1997). Petitioner Weaver disagrees. Weaver originally filed his Petition for Habeas Corpus relief in this Court on April 18, 1996. That petition was dismissed without prejudice for failure to exhaust state remedies on July 1, 1996. Weaver again filed a Petition for Writ of Habeas Corpus with this Court on June 27, 1997. The AEDPA requires that a petitioner apply to the Court of Appeals for authorization to file a second or successive application for a writ of habeas corpus in federal district court. 28 U.S.C. §2244(b)(3)(A). Weaver argues that since respondent has not claimed the instant petition before the Court is a second or successive application for relief, respondent has

conceded he has filed just one petition for a writ of habeas corpus. In short, Weaver contends the June 27, 1997 petition currently before the Court is simply a continuation of the initial petition he filed on April 18, 1996, and it is therefore not subject to the provisions of the AEDPA.

The Court need not determine whether the AEDPA applies to Weaver's petition, because the Court finds that the petition in this case should be granted even under the newer, more deferential standard of review provided under the AEDPA.

C. Analysis.

Weaver first argues that the prosecutor violated his rights under the Equal Protection Clause of the Fourteenth Amendment by impermissibly exercising peremptory challenges to exclude African-American venirepersons solely on the basis of their race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Weaver further argues that state court erred in finding that the prosecutor's proffered reasons for striking the venirepersons were not based on impermissible racial considerations. Respondent does not contend this claim has been procedurally defaulted and argues only that the lower court's decision was reasonable, is supported by the record, and is entitled to deference.

Under the AEDPA, a state court's determination that a prosecutor was not motivated by improper racial considerations in using his peremptory challenges will be upheld and the petitioner will not be entitled to habeas relief, unless the state court's determination amounted to an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). Review of the trial court's determination that no Batson violation occurred may also entail an application of th4e legal standard to the facts.

In other words, this may constitute a mixed question of law and fact under §2254(d)(1) rather than a purely factual determination under §2254(d)(2). However, the "unreasonable application" language of (d)(1) and the "unreasonable determination" language of (d)(2) establish essentially the same deferential standard. See Barker v. Ykins, et al., 993 F.Supp. 592, 604 n.11 (E.D. Mich. 1998).

In Batson, the Supreme Court stated, "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race[.]" 476 U.S. at 89 (citation and internal quotation omitted). Evaluation of a Batson claim involves a three part burden-shifting process:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991).

The state trial court held a Batson hearing to investigate Weaver's claims that the prosecutor's peremptory strikes against venirepersons Burns and Newsome were improperly motivated by racial considerations. Weaver objected during voir dire that the striking of these two African-American venirepersons demonstrated a "policy and practice of the prosecuting attorney's office to virtually eliminate blacks from the jury." Trial Tr., p. 531. Weaver also argued at trial that,

"The jury, we believe, is not representative of the population in St. Louis County. . . ." id. In response, the prosecutor explained the use of his peremptory challenges as follows:

> [T]here's not a pattern of discrimination or systematic exclusion. There are three blacks on the jury, which is 25% of the jury, which I think is higher than the black population in St. Louis County.
>
> The two blacks I struck with my peremptory strikes were not because the people were black but for other reasons. Let's see, Juror number 27, Ms. Burns, I struck for a number of reasons: One, in the death penalty phase, although she said she could impose the death penalty, I wasn't persuaded that she could. I thought she said it with some reluctance and some hesitation. I also couldn't maintain eye contact with her. I know bad vibrations and bad chemistry between a lawyer and prospective juror doesn't carry great weight with the Court or, at least, the Court of Appeals, but I think it's a legitimate reason for the attorney to strike someone.
>
> In any event, I was not persuaded that she could give the death penalty, particularly to another black person. I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her, Mr. Innman, who I have left on the jury by way of my strikes. And I simply felt that she would not be a fair and impartial juror.
>
> With regard to juror number 54, Ms.

> Newsome, I felt that she was a weak person, both during the voir dire on the death penalty . . . just the general voir dire, although Ms. Black conducted most of it. My impression of her was that she was not particularly bright and I struck a couple of white people for that very same reason. I thought in a case like this I needed intelligent people. I didn't figure she qualified in that regard and I thought she took the whole matter rather frivolously. But in any matter, Judge, of nine peremptory strikes, I have used only two to strike blacks. Seven were used to strike whites. I have left three blacks on the jury, even though I have enough peremptory strikes to attempt to remove all five.
>
> . . . .
>
> Perhaps I misstated my case somewhat with Ms. Newsome when I say intellectually weak. What I really meant is her personality struck me - - granted, she did try hard to get on the jury, which showed a civic minded interest; but in those interviews with the Court, she just struck me as a person that was a weak personality where the death penalty is involved, and I didn't think she would be able to vote for the death penalty.

Trial Tr., p. 532-33, 537.

In evaluating Weaver's claim of a Batson violation the trial court observed that three of the jurors left on the jury panel for selection of the first twelve jurors were African-American. Trial Tr., p. 533. The trial court also not4ed that an African-American was left on the venire panel for selection as the

alternate. id. The trial court proceeded to conduct a statistical analysis of the possible makeup of the jury stating, "With four out of 14, if the defendant were to leave all four of those, . . . that would constitute, I estimate, 30 percent of the entire panel." id. Based on this analysis, the trial court held no Batson violation was committed. id. at 533, 538.

If a prosecutor presented an explanation for his use of peremptory challenges with respect to specific venirepersons, and the trial court issued a ruling on the ultimate issue of intentional discrimination, the "issue of whether the defendant had made a prima facie showing becomes moot." Hernandez, 500 U.S. at 358. In the instant case, just as in Hernandez, the prosecutor defended his use of peremptory challenges without any prompting from the trial court. Thus, under the three stage burden shifting analysis, the issue of whether Weaver made a prima facie showing of a Batson violation is moot, and the Court turns its attention to the prosecutor's explanation of his peremptory strikes against Newsome and Burns, and must determine if Weaver has met his burden of proving purposeful discrimination.

Weaver offers statistical evidence as support for his argument that the prosecutor engaged in a systematic practice of striking African-Americans from juries. He states that out of four murder cases tried between 1979 and 1987 where the African-American defendant received a sentence of death, not a single African-American juror was on the panels. Pet.'s Traverse, App. 1. Weaver further contends that during the same period of time very few African-Americans were allowed to sit on panels which sentenced an African-American defendant to life imprisonment without the possibility of parole. id. at App. 2. The Court concludes this statical evidence is insufficient to support a finding that the trial court made an "unreasonable determination" as required to grant Weaver's petition for habeas relief.

Weaver cites Cochran v. Herring for the proposition that statistics alone are sufficient to prove intentional discrimination during voir dire. 43 F.3d 1404, 1410 (11th Cir. 1995). In Cochran, however, the petition presented statistical evidence as well as testimony from prosecutors and former prosecutors with the district attorney's office stating the general philosophy of the office was that African-American jurors should be prevented from serving as jurors whenever possible. Id. Weaver argues that in Ford v. Norris, the Eight Circuit declared statistical data was sufficient to prove the prosecutor excluded African -Americans over a period of time for a Swain violation.[2] 67 F.3d 162, 166 (8th Cir. 1995). Like Cochran, however, the petitioner in Ford also presented testimony from local attorneys who stated that a particular prosecutor consistently used peremptory challenges to strike as many African-Americans from juries as possible. Id.

The statistical information provided by Weaver is to be accompanied by any testimony from local attorneys, let alone prosecutors or former prosecutors and is too scant to support a finding that the prosecutor was motivated by improper racial considerations. Compare Miller v. A.L. Lockhart, 65 F.3d 676 (8th Cir. 1995) (relying on very detailed analysis provided by statistician Dr. Berry). Giving the trial court the deference it is due under the AEDPA, the Court determines Weaver's statistical evidence is an insufficient basis on which to conclude the trial court unreasonably determined no Batson violation occurred as to venirepersons Newsome and Burns.

With respect to venireperson Newsome, Weaver argues that the reasons offered by the prosecutor for striking her are

---

[2]Swain v. Alabama, 380 U.S. 202 (1965), was the controlling case for proving racial discrimination prior to Batson.

pretextual. The prosecutor struck her based on his feeling that she was "weak. . . on the death penalty." Trial Tr., p. 532. The prosecutor also stated he struck venireperson Newsome because she was "not particularly bright," the same reason he struck some Caucasian people from the jury panel. id. at 532-33. After the prosecutor offered an explanation of his peremptory strikes to the trial court judge, Weaver's trial attorney developed the record further in an attempt to show that the prosecutor's proffered reasons were a pretext for discrimination. Trial Tr. p. 534. Pretext can be provided by presenting evidence that non-minority panel members who share the same characteristics as the stricken minority venireperson remained on the panel. United States v. Jenkins, 52 F.3d 743, 747 (8th Cir. 1995). Weaver's trial attorney specifically stated "[Newsome] was not asked anything specifically which would indicate what her intelligence was one way or another." Trial Tr., p. 534. Weaver's trial attorney also argued that the prosecutor assumed she was not intelligent without any basis for doing so and stated Newsome gave responses similar to those of Caucasian jurors who were not stricken from the jury. id. The trial court then had to determine if the prosecutor's articulated reasons were race neutral and whether Weaver met his burden of proving purposeful discrimination. Hernandez, 500 U.S. at 359.

A challenge of peremptory strikes based on subjective assessments such as a venireperson's demeanor must be carefully scrutinized. Jenkins, 52 F.3d at 746; United States v. Sherrills, 929 F.2d 393, 395 (8th Cir. 1991). The trial court should evaluate the credibility of each reason offered by the prosecutor. United States v. Scott, 26 F.3d 1458, 1466 (8th Cir. 1994). Upon review of the record, it appears the trial court did not issue an explicit ruling as to whether the reasons offered by the prosecutor were pretextual, but instead focused on the number of African-Americans left on the panel and relied solely on its own numbers analysis to determine that no prima facie

showing of discrimination had been made. Trial Tr., p. 533, 538.

In Jenkins, the petitioners claimed on appeal that the trial court "failed to consider the veracity of the government's asserted explanations" for its use of peremptory strikes against minority members of the jury panel. 52 F.3d at 746. At trial, the prosecutors pointed to specific behavior by two jurors, such as scowling, that they interpreted as disinterest and therefore struck from the panel. Id. The trial court then proceeded to inquire as to whether the prosecutor struck any non-minority venirepersons for disinterest, considered the statements made by the prosecutor, and assessed the credibility of those statements. Id. Based on the fact that the trial court assessed the truthfulness of the reasons offered by the prosecutor in Jenkins, the Eighth Circuit held the trial court "implicitly found . . . the government's use of the peremptory challenges was not motivated by race." Id.

As in Jenkins, the prosecutor in the instant case also described specific behavior and responses by venireperson Newsome which lead to his decision to strike her from the panel. Trial Tr., p. 532-33. The record in this case, however, is devoid of any evidence that the trial court actually considered the genuineness of the prosecutor's proffered reasons for striking Newsome, much less that the trial court made a determination as to whether those reasons were pretextual. The trial court found that no Batson violation existed without even considering whether the prosecutor's stated reasons for striking venireperson Newsome from the jury were a pretext for discrimination, and relied solely on its own numbers analysis in reaching that conclusion.

Although a trial court is not required to make express findings on each required element of a Batson claim. United States v. Perez, 35 F.3d 632, 636 (1st Cir. 1994), there must be

some indicia that the spirit of Batson was complied with and that findings sufficient to cover each of the three elements were made. Jenkins, 52 F.3d at 747. It is well established that the striking of even one venireperson for racially motivated reasons violates the Equal Protection Clause and is a Batson violation. United States v. Rodriguez, 859 F.2d 1321, 1324 (8th Cir. 1998) (citing United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987)). By relying solely on a numbers analysis and not analyzing whether Newsome was struck for improper racial reasons, the trial court clearly reached a decision which resulted from the unreasonable application of law as announced in Batson. 28 U.S.C. §2254(d)(1). A new trial is therefore warranted. Shurn v. Delo, 177 F.3d 662, 665 (8th Cir. 1999).

The Court now turns its attention to the prosecutor's strike of venireperson Burns from the panel. Weaver argues that Burns was struck from the jury solely because she was African-American, as is Weaver. Weaver points out that the prosecutor stated to the trial court, "In any event, I was not persuaded that she would give the death penalty, particularly to a fellow black person." Trial Tr., p. 532. "Whether a race-neutral explanation is a pretext for discrimination is a question of fact." Gee v. Groose, et al., 110 F.3d 1346, 1351 (8th Cir. 1997). In the normal course of review, this Court would only overrule a trial court's factual finding that the reasons offered by the prosecutor were race neutral if it was an unreasonable determination. 28 U.S.C. §2254(d)(2). Just as with Newsome, however, the trial court ran afoul of Batson unreasonably applying the law in failing to analyze whether the prosecutor's proffered reasons for striking Burns were race neutral and a new trial is required. Tr. T. p., 533, 538, 28 U.S.C. §2254(d)(1).

In the event it can be ascertained that the trial court actually considered the prosecutor's reasons for striking Burns and determined they were race neutral, the Court goes on to address Weaver's claim that such a factual determination was

unreasonable. 28 U.S.C. §2254(d)(2). Weaver argues "the prosecutor believed black venirepersons would be impartial to black defendants and, therefore, fails to vote for the death penalty." Pet.'s Trav., p. 16. This is clear from the fact that the prosecutor followed his opinion that Burns was not strong enough to sentence another African American to death by stating, "I simply felt she would not be a fair and impartial juror." Trial Tr., p. 532. The prosecutor also stated he struck Burns because he had bad chemistry with her, did not feel she was strong enough, and she was joking with a fellow venireperson too much. id. at 532-33. Although these reasons are race neutral, they are ancillary at best. The main thrust of the prosecutor's stated reason for striking Burns was that he felt she could not sentence a fellow African American to death. id. "[A] prosecutor's 'assumption that a black juror may be presumed to be partial simply because is black' . . . violates the Equal Protection Clause." Holland v. Illinois, 493 U.S. 474, 484 n.2 (1990). The Court is aware that the AEDPA has "heightened [the] evidentiary burden on a habeas petitioner's challenge to a state court's factual findings." Pruett v. Norris, 153 F.3d 579, 584 (8th Cir. 1998). Even under this heightened standard, however, the Court finds the prosecutor struck venireperson Burns for reasons which were clearly not race neutral and that Weaver has met his overall burden of proving discrimination. Thus, a Batson violation occurred with respect to Burns and a new trial is required.

III. CONCLUSION

The Court finds the trial court failed to apply the correct legal standard in setting Weaver's claims that venirepersons Newsome and Burns were struck from the jury for improper reasons. Instead of analyzing the veracity of the prosecutor's proffered reasons for striking Newsome and Burns, the trial court simply found no Batson violation occurred based on the number of minorities remaining of the venire panel. This in

and of itself requires a new trial. Furthermore, with respect to Burns, it is clear that the reasons articulated by the prosecutor for striking her were not race neutral in direct violation of Batson. The Court need not address Weaver's other constitutional claims, because claims warrant habeas relief and a new trial.

Because the Court has already determined Weaver is entitled to a Writ of Habeas Corpus, the Court will deny his request for an evidentiary hearing as moot. The Court will vacate the judgment and sentence in State of Missouri v. William Weaver, Cause No. 565118B, and will enter a Writ of Habeas Corpus. If respondent elects to retry Weaver, a notice of its intention to do so must be filed prior to September 27, 1999.

Accordingly,

IT IS HEREBY ORDERED that petitioner William Weaver's First Amended Petition for Writ of Habeas Corpus is GRANTED. [Doc. 15]

IT IS FURTHER ORDERED that William Weaver's request for an evidentiary hearing is DENIED as moot.

IT IS FURTHER ORDERED that the Judgment and Sentence in State of Missouri v. Weaver, Cause No. 565118B is VACATED. If the State of Missouri elects to retry William Weaver, it must file a notice of its intention to do so prior to September 27, 1999.

A Writ of Habeas Corpus shall accompany this Memorandum and Order.

Charles A. Shaw
United States District Judge

Dated this 9th day of August, 1990.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2880/2938

William Weaver,	*
	*
Appellee/Cross-Appellant,	*
	*Order Denying Petition
v.	*Rehearing and for Re-
	*hearing En Banc
Michael Bowersox,	*
	*
Appellant/Cross-Appellee.	*

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Chief Judge Loken, Judge Wollman, Judge Riley, Judge Coloton, and Judge Gruender would grant Michael Bowersox's petition for rehearing en banc.

Judge Benton did not participate in the consideration or decision of this matter.

May 31, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court of Missouri
en banc

STATE OF MISSOURI, Respondent,	)
v.	) No. 71051
WILLIAM WEAVER, Appellant.	)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

The Honorable Alphonso H. Voorhees, Judge
The Honorable Herbert Lasky, Judge

William Weaver was convicted of the first degree murder of Charles Taylor and sentenced to death.[3] A post-conviction motion was filed pursuant to Rule 29.15. Relief was denied after an evidentiary hearing. Appeals from both judgments were consolidated. This Court has jurisdiction. *Mo. Const. art. V, § 3.* The conviction, sentence and denial of relief pursuant to Rule 29.15 are affirmed.

Prior to July 1987, Charles Taylor and members of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution had been commenced against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.

---

[3]Daryl Shurn was also convicted of murdering Taylor. *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993), *cert. denied*, 513 U.S. 837, 115 S.Ct. 118, 130 L.Ed.2d 64 (1994).

On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home in the Mansion Hills apartment complex. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver was supposed to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area where Taylor had fallen and shot Taylor again. Taylor died from several gunshot wounds to the head.

Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street, sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from his home. He claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from the Shurn car after the crash.

While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that

Weaver told him he was a hit man on the streets, that defendant and Shurn had killed Charles Taylor, and that defendant's testimony at trial would be that he was merely out jogging when the police stopped him. Weaver's primary defense at trial was misidentification by police.

On this evidence the jury convicted Weaver of first degree murder in the shooting death of Charles Taylor. He was sentenced to death. A post-conviction relief motion was filed and denied.

I.

In his first point, defendant claims the prosecutor exercised two peremptory strikes against venirepersons B and N, in violation of the prohibition in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986). At the *Batson* hearing, Weaver objected to the state's two strikes because the "striking of the two blacks evidenced a policy and practice of the prosecuting attorney's office to virtually eliminate blacks from the jury." The prosecutor's response was as follows:

> [T]here's not a pattern of discrimination or systematic exclusion. There are three blacks on the jury, which is 25% of the jury, which I think is significantly higher than the black population in St. Louis County.
>
> The two blacks I struck with my peremptory strikes were not because the people were black but for other reasons. Let's see. Juror number 27, Ms. [B], I struck for a number of reasons: One, in the death penalty phase, although she said she could impose the death penalty, I wasn't persuaded that she could. I

thought she said it with some reluctance and some hesitation. I also couldn't maintain any eye contact with her. I know bad vibrations and bad chemistry between a lawyer and a prospective juror doesn't carry great weight with the Court or, at least, the Court of Appeals, but I think it's a legitimate reason for the attorney to strike someone.

In any event, I was not persuaded that she could give the death penalty, particularly to a fellow black person. I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her, Mr. [I], who I have left on the jury by way of my strikes and I simply felt that she would not be a fair and impartial juror.

With regard to juror number 54, Ms. [N], I felt that she was a weak person, both during the voir dire on the death penalty and on the voir dire on the death penalty, and on the voir dire-just the general voir dire, although Ms. Black conducted most of it. My impression of her was that she was not particularly bright and I struck a couple of white people for that very same reason. I thought in a case like this I needed intelligent people. I didn't figure she qualified in that regard and I thought she took the whole matter rather frivolously.

....

Perhaps I misstated my case somewhat with Ms. [N] when I say intellectually weak. What I really meant is her personality struck

> me-granted, she did try hard to get on the jury, which showed a civic minded interest; but in those interviews with the Court, she just struck me as a person that was a weak personality where the death penalty is involved, and I didn't think she would be able to vote for the death penalty.

The trial court found the prosecutor's explanations to be race-neutral.

It is error to use a peremptory strike to challenge jurors solely on the basis of race or on the assumption that members of a particular racial group are unable to impartially consider the state's case against a member of the juror's racial group. *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. Where a prosecutor gives a reasonably specific, race-neutral reason for making peremptory strikes, the prosecutor's explanation will suffice unless there is an inherently discriminatory intent in that explanation. *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 1865-66, 114 L.Ed.2d 395 (1991). A legitimate reason is not one that makes sense but one that does not deny equal protection. *Purkett v. Elem*, ____ U.S. ____, 115 S.Ct. 1769, 1771 (1995). A reviewing court will set aside the trial court's finding as to whether the prosecutor discriminated in the exercise of peremptory challenges only if such finding is clearly erroneous. *State v. Blankenship*, 830 S.W.2d 1, 15 (Mo. banc 1992).

The trial judge is obligated to apply a three-pronged analysis in assessing the explanations provided by the prosecutor. *State v. Antwine*, 743 S.W.2d 51, 64-65 (Mo. banc 1987), *cert. denied* 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988). Trial judges must evaluate the susceptibility of the particular case to racial discrimination, the prosecutor's demeanor and, finally, the judge must evaluate the explanation

itself. *Id.* at 65. Crucial to the analysis is whether similarly situated white venirepersons escaped the state's challenge. *Id.*

A.

Weaver asserts that striking B because she could not give the death penalty to a fellow black violates *Batson* and is racially discriminatory on its face. The prosecutor's stated reasons for striking B were based upon her words and his observations of her conduct in the prosecutor's presence during voir dire in which the prosecutor perceived bias by juror B indicating her inability or unwillingness to impose the death penalty. What a prosecutor observes about a potential juror in voir dire, as well as what is said, may form a legitimate nondiscriminatory basis for exercising a peremptory strike. *See Purkett*, 115 S.Ct. at 1771. Those observations here included reluctance and hesitation in answering questions, lack of eye contact with the prosecutor, lack of strength, and "cutting up" and talking during voir dire. The prosecutor's explanation here was specific, race-neutral, and free of any racially discriminatory purpose. The trial court had the opportunity to observe the juror in question, listen to the manner in which she answered the questions, and to assess the prosecutor's demeanor and reasons for striking the juror.

Weaver cites a series of cases in which a prosecutor's racial stereotyping or assumptions made by the prosecutor about members of a minority group were held to be inadequate reasons for using a peremptory strike to dismiss a juror. *See Rush v. Smith*, 56 F.3d 918 (8th cir. en banc 1995); *Moore v. State*, 811 S.W.2d 197, 200 (Tex.App.1991); *Somerville v. State*, 792 S.W.2d 265, 268-69 (Tex.App.1990); *State v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707, 710 (1989); and *State v. Holman*, 759 S.W.2d 902 (Mo.App.1988). The distinction between this case and all of those relied on by the defendant is that in this case, the prosecutor's decision to strike B was not

based solely on race or upon any assumptions about persons of B's race but was based upon the way she behaved and answered questions, that is, hesitation, lack of eye contact, flippancy and other intangibles observed only by those present in the courtroom. Specifically, in *Holman* the juror in question was struck because "she is a woman and because she is black." *Holman*, 759 S.W.2d at 903. In *Holman*, neither of the reasons given were based upon conduct or answers in the courtroom but, rather, on assumptions made about race and gender. Thus, *Holman* does not require us to find a *Batson* violation in this case.

B.

As to N, the state's reason for striking her was race-neutral. By her words and conduct, N led the prosecutor to believe that she was frivolous, had a weak personality or was intellectually weak, particularly where the death penalty was concerned. It is not inherently pretextual to say that in a capital case a prosecutor would want serious jurors that are of above average intelligence and not reluctant to impose the death penalty when appropriate.

In determining if purposeful discrimination has occurred, the trial court should take into account a variety of factors, but the chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992), *cert. denied* 506 U.S. 1014, 113 S.Ct. 636, 121 L.Ed.2d 566 (1992). It is not unusual for prosecutors to use their observations, past experience and common sense in exercising peremptory challenges, so long as the factors they rely on are race-neutral. *Id.; Blankenship*, 830 S.W.2d at 15-16.

There is another factor that weighs against the

contention that the prosecutor had a policy and practice to eliminate blacks from the jury, as was indicated in the defendant's objection. While this Court stops short of engaging in a "numbers analysis" to determine Weaver's *Batson* claim, the overall composition of the jury in this case belies the objection made at trial that the prosecutor's strikes against the two black jurors were racially motivated. *See Parker*, 836 S.W.2d at 940. Three of those who actually served on the jury and returned the verdict were African-Americans.

The first point is overruled.

II.

In his second point, Weaver claims the trial court erred in admitting hearsay evidence. During cross-examination of police officer Cantwell, defense counsel elicited that the police found a briefcase belonging to Taylor near his body and that it contained a cocked and loaded .32 caliber handgun. It appears the defense was attempting to use the handgun evidence to create an inference that the victim was a violent person involved in the drug trade.

In response to this evidence, the prosecutor called Taylor's wife and another police officer, who collectively testified that Taylor had told them that he was carrying a gun because the word on the street was that Daryl Shurn intended to kill Taylor and that Shurn gave Taylor the "thumbs down" gesture when they saw one another in the city courts building.

In order for evidence to be admissible, it must be relevant, logically tending to prove a fact in issue or corroborate relevant evidence that bears on the principal issue. *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied* 454 U.S. 933, 102 S.Ct. 432, 70 L.Ed.2d 240 (1981). Weaver argues that because he was not attempting to prove self-defense, and

because the briefcase and its contents were not relevant to the defense that he had been misidentified while jogging, evidence of Taylor's motivation for carrying the loaded handgun should not have been admitted. While Weaver is correct that the primary thrust of the defense was misidentification, the defendant injected the issue that the victim was carrying a loaded weapon. That tactic was designed to permit the jury to infer that the victim was violent and posed a threat to defendant. Thus, it was defense counsel's tactic to inject into the case the victim's state of mind.

Under the doctrine of curative admissibility, "where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Lingar*, 726 S.W.2d 728, 734-35 (Mo. banc 1987), *cert. denied* 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987). Under this doctrine, the defendant must first have introduced evidence, even though it might be technically inadmissible evidence. *See State v. Shurn*, 866 S.W.2d 447, 458 (Mo. banc 1993), *cert. denied* 513 U.S. 837, 115 S.Ct. 118, 130 L.Ed.2d 64 (1994). The victim's statement of fear of the defendant as a reason for carrying the gun was relevant and not unduly prejudicial under the state of mind exception to the hearsay rule. *Id.*; *State v. Boliek*, 706 S.W.2d 847, 850 (Mo. banc 1986), *cert. denied* 479 U.S. 903, 107 S.Ct. 302, 93 L.Ed.2d 276 (1986).

In his amended Rule 29.15 motion, defendant alleged that his trial counsel was constitutionally ineffective in not calling Larry Shurn's attorney as a witness to contradict the alleged confrontation at the civil courts building between Larry Shurn and Charles Taylor, in which Larry Shurn gave Taylor the "thumbs down" gesture. The attorney testified at the Rule 29.15 hearing that his memories were "very sketchy" of what occurred. In response to the question as to whether he saw Larry

Shurn give the signal, the attorney answered "no" but went on to respond, "I can't say that it didn't happen." The motion court found that this impeaching witness's testimony would not have changed the outcome of the murder trial. In order to establish the constitutionally ineffective assistance of counsel, defendant must show counsel's performance was so deficient as to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Here, the witness's testimony does not prove that the gesture was not made. Counsel's failure to call such witness does not undermine confidence in the outcome. The second point is denied.

III.

In his third point, Weaver complains that the trial court erred in failing to grant either a hearing before the verdict or a new trial after it was disclosed that the state's investigator, Lawrence Freeman, posed as a juror, wore a juror button, and mingled with the venire panel during the first day of jury selection either while the members of the venire panel were in the hallway outside the courtroom or in a jury assembly area on a separate floor.

During the early stages of the trial, Freeman became alarmed by a group of persons he believed to be members of the Weaver family who were standing near the courtroom where jury selection was taking place. According to Freeman, both men and women were carrying Gucci bags or purses capable of concealing weapons. Freeman responded by obtaining a juror badge from one of the court's staff in order to "provide security." While wearing the juror badge, Freeman was watching the persons near the courtroom door when he was approached by Mr. Smith, one of those who was ultimately selected to serve as a juror. The two were previously acquainted. Smith spoke to Freeman but was told by Freeman

that he could not talk because Freeman had been called to jury duty. Freeman claimed to have gotten word to the prosecutor about the bags, who informed the judge. When the judge announced that all persons entering the courtroom would be searched, the persons with the bags left.

Defense counsel observed Smith and Freeman talking, knew Freeman was an investigator for the prosecutor, and also knew that Smith was a juror. However, she did not bring her information to the attention of the trial judge prior to the trial by moving to strike Smith for cause and did not use a peremptory strike to remove Smith from the jury. Defense counsel first brought the matter to the attention of the trial judge during the instructions conference. The trial judge was concerned that an interrogation of the jurors at that time about what had occurred before the trial might be disruptive and so did not take immediate action. After the jury had completed its deliberations, the trial judge inquired before the jurors were discharged if any of them had contact with Freeman during the trial or whether Freeman had attempted to make any effort to discuss with any of them anything regarding the case. Juror Smith replied, "I know him. I spoke to him before the trial." There is nothing in the record to indicate that Freeman spoke with Smith about the subject matter of the trial.

Without a doubt, the court employee who gave the juror button to Freeman should be reprimanded, and Freeman's conduct was thoughtless, if not bizarre. He also should be admonished by his employer. Trial judges, lawyers, and those who are assigned to provide security and look after the needs of jurors while they are being selected, hearing evidence or deliberating must constantly guard against any outside influence or distraction.

Nevertheless, Freeman's actions do not rise to the level of *State v. Post*, 804 S.W.2d 862 (Mo.App.1991), where a

deputy sheriff and a police officer not assigned to the case mingled with jurors at their hotel rooms, and one deputy and a juror engaged in sexual improprieties such that the jury had been so distracted that it could not give "due and fair consideration of the facts." *Id.* at 862-63.

Where misconduct involving jurors during the progress of the trial is alleged, the verdict will be set aside unless the state affirmatively shows that the jurors were not subject to improper influences. *State v. Edmondson*, 461 S.W.2d 713, 723 (Mo.1971). In this case, where the facts are fully disclosed and they conclusively demonstrate an absence of prejudice to the defendant and an absence of any improper influence on the juror in question there is no prejudice. Under these circumstances, Weaver is not entitled to a new trial.

IV.

Defendant argues that the state's closing arguments during both the guilt and penalty phases of the trial were erroneous and further that counsel was ineffective in failing to object to some of the improper arguments. A review of the record discloses that defense counsel objected vehemently to almost all the arguments complained of here and that several of the objections were sustained, followed by curative instructions to the jury. The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted. *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo.1982). Our review of the arguments discloses neither error in permitting the arguments nor ineffective assistance of counsel in failing to object.

A.

First, Weaver alleges that the prosecutor improperly

emphasized his position as elected prosecutor in his choice of seeking the death penalty. The specific arguments were as follows:

(1) In the guilt phase, the prosecutor said, "If you don't believe the state's case here, you twelve people would never convict anybody." Defense counsel objected, and the court instructed the jury to disregard the comment.

(2) In the penalty phase closing, the prosecutor said, "Well, if this isn't [the proper case for the death penalty], what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? ··· If this isn't a case that calls for the death penalty, I can't imagine one that would." The court overruled defense counsel's objection to this argument.

(3) Continuing his penalty phase closing argument, the prosecutor said, "I mean, if this isn't the case for the death penalty, then there's no case you'll do it ··· and, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty···· I'm the prosecuting attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." The trial court sustained the defendant's objection to the last statement and instructed the jury to disregard it.

(4) Finally, the prosecutor said, "If these facts don't justify, don't cry out for the death penalty, then which facts do?" To that statement, the trial court overruled the objection.

A prosecutor's argument may make reasonable inferences from the evidence. *Shurn*, 866 S.W.2d at 460; *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983), *cert. denied* 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985).

The inferences need not necessarily seem warranted. *Grubbs v. State*, 760 S.W.2d 115, 119 (Mo. banc 1988), *cert. denied* 490 U.S. 1085, 109 S.Ct. 2111, 104 L.Ed.2d 672 (1989). Statements by a prosecuting attorney in argument indicating his or her opinion that the accused is guilty, where it is apparent that such opinion is based on the evidence in the case, is permissible. *State v. Moore*, 428 S.W.2d 563, 565 (Mo.1968); *State v. Paglino*, 319 S.W.2d 613, 625 (Mo.1958). In this case, the prosecutor's rhetorical questions may seem flamboyant, if not somewhat abrasive, to a juror's ears. However, given the eyewitness testimony of how the murder was carried out and the cold execution manner in which the victim was killed, it is fair for the prosecutor to point out the strength of the state's case. The use of the rhetorical questions was, for the most part, a fair comment on the strength of the case.

As for his statements regarding his position as prosecuting attorney of the county, the court properly sustained the objections and directed the jury to disregard the argument. Trial courts have a superior vantage point from which to assess the pervasive effect of an improper argument. Thus, whether it can be dissipated by timely and appropriate action short of declaring a mistrial is a matter within the sound discretion of the trial court. *State v. Carter*, 641 S.W.2d 54, 60 (Mo. banc 1982), *cert. denied* 461 U.S. 932, 103 S.Ct. 2096, 77 L.Ed.2d 305 (1983).

This case is distinguishable from cases relied on by the defendant, including *State v. Evans*, 820 S.W.2d 545 (Mo.App.1991). There the prosecutor said, "If [the defendant] were innocent, I wouldn't bring a charge." *Id.* at 547. Merely stating that the prosecutor determines which penalty to ask for in capital cases is not the same as saying that if the defendant were innocent, he would not be charged. The objection, followed by the curative instruction, is adequate here.

In addition, this case is distinguishable from *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir.1989). There the court found that because the prosecutor expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant, under the totality of the circumstances rendered the penalty phase of the trial fundamentally unfair. 885 F.2d at 1336-37. The arguments here do not rise to the level of the egregious conduct that is reported in Newlon. Neither is this case comparable with *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), where this Court reversed the punishment in a capital case because the prosecutor, among other excesses, had compared the brutality of the murder as being worse than all other murders in the county. Here there was no abuse of discretion in the trial court's ruling on defense counsel's objections.

B.

In his closing remarks, the prosecutor called the defendant's misidentification defense a "cock and bull story" and a "smokescreen," referred to the defendant as a liar, said defense counsel was "bold" and called into question the credibility and motives of several defense witnesses. Weaver characterizes the state's closing arguments as portraying defense counsel as having suborned perjury. Comments to the effect that a defendant or a defense witness were lying have repeatedly been upheld. A prosecuting attorney may comment on the evidence and the credibility of witness and, in the process, may belittle and point to the improbability and untruthfulness of specific testimony. *State v. Johnson*, 496 S.W.2d 852, 859 (Mo.1973). Here the comments on the testimony of the witnesses were well within the range of the prosecutor's adversarial responsibilities in making closing argument.

Directly arguing that defense counsel has suborned perjury or fabricated evidence has been held to be prejudicial error. *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App.1989); *State v. Harris*, 662 S.W.2d 276, 277 (Mo.App.1983). However, the prosecutor here did not go that far when he said:

> I don't know whether the smokescreen [defense counsel is] creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see, it's nothing more than a smokescreen. . .
>
> . . . .
>
> [Defense counsel has] got the nerve to show you these photographs that she said look like they were taken at nighttime. I guess you just have to believe with somebody that bold that she is going to suggest that was taken at night time as opposed to bad exposure, if you want to buy that boldness.

To suggest that the arguments advanced by defense counsel are "smokescreens" or "bold" fall short of accusing counsel of suborning perjury or the other egregious accusations against defense counsel that occurred in *Burnfin, Harris*, or other cases relied on by the defendant. At most, the comments by the prosecuting attorney were near error which, by definition, is not error. The point is denied.

C.

Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued

matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

V.

Weaver complains that the prosecutor failed to disclose all evidence favorable to the accused in response to his pretrial requests. The details of the state's response to Weaver's pretrial request were not included in the defendant's record filed on appeal. Neither was the response to the request presented at the post-conviction hearing. As best can be determined from the record, the following apparently was disclosed to defense counsel prior to trial:

Tabler had been an inmate at the St. Louis County Correctional Facility for nine months prior to trial. Charges were pending against him for receiving stolen property and a misdemeanor offense for possession of marijuana. His prior convictions included sodomy and oral copulation in 1980 in California, for which he was sentenced to three years in prison and served two, rape in 1983 in California, upon which he received a three-year sentence and served twenty-two months in prison, and a possession of methamphetamines conviction in 1986 in California for which Tabler received six months, four

of which were served. It was also disclosed that Tabler was on parole from the state of California at the time of trial and was facing approximately a year and a half in prison there. Finally, it was disclosed that Tabler had made a deal with the state that in exchange for his testimony, the state would recommend a year for the receiving stolen property charge and six months for the possession of marijuana charge. The record also disclosed that Tabler had been charged as a persistent offender and was subject to an extended term of up to sixteen years but, because of the agreement made by the state, Tabler knew he could possibly get out of prison in five months time.

Weaver complains here that his constitutional right to a fair trial was violated because the state failed to disclose, in addition to the above, that (1) prior to the time Tabler came forward with the information about Weaver, he had been offered a five year sentence; (2) Tabler gave a false name when initially arrested, and (3) Tabler's bond had been set at $500,000.

The United States Supreme Court has held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). A due process violation occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). A reasonable probability of a different outcome exists where the failure to disclose the evidence "undermines confidence in the outcome of the trial." *Id.* at 682, 105 S.Ct. at 3383. Considering the information that was disclosed by the state showing Tabler to have been convicted of multiple contemptible crimes and that his testimony was given

in exchange for an extremely generous deal by the state makes the failures to disclose complained of by the defendant pale in comparison. The absence of the allegedly undisclosed evidence does not undermine confidence in the verdict. *See Kyles v. Whitley*, ___U.S. ___, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995).

In any event, the defendant has failed to make clear what was and was not disclosed prior to trial and has put this Court in the position of having to parse through the record to determine exactly what was not disclosed. That alone would be sufficient to deny this claim without further discussion. However, because this is a capital case, the Court has carefully reviewed the record before resolving this point against Weaver.

VI.

Weaver argues that in a letter written by the prosecutor two days after he was sentenced, the prosecutor improperly "attempted to poison" the trial judge who was then in the process of preparing a report pursuant to Supreme Court Rule 29.08(c). The purpose of the report is to assist this Court in its proportionality review. The prosecutor's letter and the police report attached recounted that one Willy Greer had made statements that he had attended a meeting which included Daryl Shurn where it was suggested that Weaver might be recruited not only to kill the victim here, but also to kill a police officer. The prosecutor's letter suggested that had defendant not been arrested in this matter, the officer would also have been killed.

The only authority cited by Weaver in support of his contention that the prosecutor's conduct was improper and requires reversal is *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), where it is stated that a prosecutor has a duty to "serve justice, not just win the case." *Id.* at 901. Since the prosecutor's letter and the attached police report were received after sentencing and was not considered in any respect in determining

defendant's guilt or sentence, it is difficult to comprehend how it could have been prejudicial to the defendant, even assuming it is an improper communication. The point is denied.

VII.

Weaver complains that in the post-conviction relief proceeding the court clearly erred in impeding his attempts to obtain meaningful discovery by (a) overruling Weaver's motion to compel answers to interrogatories and requests for production, (b) quashing Weaver's deposition subpoenas, (c) denying his motion to compel answers to certified deposition questions, and (d) overruling motions to seek reconsideration of all the foregoing discovery rulings. Despite Weaver's suggestion that the motion court's handling of discovery matters should be reviewed merely for error, rulings on requests for discovery in post-conviction proceedings are reviewed to determine if the motion court clearly erred. *See State v. Six*, 805 S.W.2d 159, 173 (Mo. banc 1991), *cert. denied* 502 U.S. 871, 112 S.Ct. 206, 116 L.Ed.2d 165 (1991). Our review does not demonstrate that the motion court clearly erred in denying defendant's various discovery motions.

The discovery requests pertained to prosecutorial discretion to seek the death penalty, the personnel and hiring practices of the St. Louis County Prosecuting Attorney's Office, the involvement of any and all employees in defendant's and Shurn's cases, and the comparative cost of death penalties as opposed to life without parole. Defendant also sought to compel answers to numerous certified deposition questions. In one instance, the witness being deposed was a social worker who worked with Tabler and had been a former police officer. The trial court refused to compel the social worker to explain why he had left his employment as a police officer or about the time, place and content of his conversations with Tabler about the defendant's involvement in the crime. In addition, officer

Layshock, who had worked with a witness in getting him to testify against Shurn, was not required to answer questions at the post-conviction deposition as to whether he had been the subject of any disciplinary actions in the police department.

Nothing in defendant's argument suggests how such evidence may have been relevant to the issues raised in the post-conviction petition. The ruling of the motion court in rejecting the apparent use of discovery for a "fishing expedition" is not so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration of defendant's discovery requests. The denial of the discovery requests was not clearly erroneous.

VIII.

In his eighth point, Weaver violates Rule 84.04(d) by not setting forth briefly and concisely what action or ruling of the trial court is under review but rather presents a collage of various rulings both by the trial court and the post-conviction court denying relief for what he characterizes as "multiple acts of misconduct" by the prosecutor. Because of a violation of the rules on briefing, if this were not a death penalty case, none of the points raised would be considered. The Court shall attempt to discuss what it perceives to be the points raised.

A.

Under the first part of his argument, Weaver contends that the Rule 29.15 motion should have been sustained because of (1) the prosecutor's over-aggressive cross-examination of Weaver at trial about prior arrests, (2) over-aggressive prosecutorial examination about a sexual relationship Weaver had with a teenage girl who testified on defendant's behalf and (3) the prosecutor's allegedly improper closing argument that defense counsel was expensive because she was "terrific."

With regard to the cross-examination of defendant about prior arrests, it occurred after defendant and certain of his character witnesses had testified that in some neighborhoods in St. Louis, young black men are often arrested without cause. This evidence left the jury with the inference that while defendant had prior arrests, the arrests were unjustified. Under the doctrine of curative admissibility, the prosecutor was entitled to delve into the defendant's arrests, introducing otherwise inadmissible evidence to counteract the negative inferences. *Shurn*, 866 S.W.2d at 458. Any objection to this would have been without merit. This aspect of the claim is denied.

Defendant called a teenage female to explain why Weaver's car was in the Mansion Hills parking lot. The prosecutor cross-examined her regarding her sexual relationship with defendant. A witness's relationship with the defendant is a relevant subject of cross-examination to show the witness's bias or prejudice in favor of or against a defendant. *State v. Johnson*, 700 S.W.2d 815, 817 (Mo. banc 1985), *cert. denied* 476 U.S. 1119, 106 S.Ct. 1980, 90 L.Ed.2d 663 (1986). Here there was no objection to the evidence, there was no prosecutorial misconduct or ineffective assistance in defense counsel's failure to object. This claim is denied.

Defendant claims the prosecutor improperly commented on his right to counsel. This argument came in response to defense counsel's argument that Weaver was not a hit man. Defense counsel said:

> Any hit man does not have to struggle to get an attorney. He's got money all up there, sell some of his diamond rings and everything to get them, any hit man. But a William Weaver, a young man snatched off the street would have to struggle, would have to fight, would have to

> read [sic] his case, would have to try to get somebody to represent him.
>
> And a hit man wouldn't have to be driving the likes of a '73 Buick LeSabre. He'd have the fine kind of cars that this kind of money can buy.

To this, the prosecutor responded:

> So I don't know how [defense counsel's] fee was paid; but I guarantee you, she's not inexpensive, because she's terrific.

Parties have considerably more leeway when argument is retaliatory and during rebuttal. *Shurn*, 866 S.W.2d at 461. There was no error, plain or otherwise, in permitting the argument and counsel was not ineffective for failing to object.

B.

Defendant faults the prosecutor for allegedly failing to disclose a tape of a call to an emergency "911" number reporting that Taylor had been shot and giving a description of the suspect and for failing to disclose a notation on an arrest record in the prosecutor's file noting "D in maroon jacket." It is argued that the contents of the 911 tape and the notation on the police record "may have caused any description contained in the 911 tape to take on greater significance for purposes of additional discovery." The argument fails to disclose what significance the 911 tapes had to the defense. The argument also fails to disclose what relevance the notation "D in maroon jacket" might have had. To have any significance, the two matters require that a series of assumptions be made favorable to defendant's theory before a failure to disclose can be shown in any way to have been material or exculpatory. Here, Weaver has made no showing as to the materiality or exculpatory nature

of the tape or the notation. A defendant is not entitled to information on the mere possibility that it might be helpful but must make some "plausible showing" how the information would have been material or favorable. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15, 107 S.Ct. 989, 1002 n. 15, 94 L.Ed.2d 40 (1987). The mere possibility that these undisclosed items might have led to future discovery does not implicate a due process violation. See *State v. Parker*, 886 S.W.2d 908, 916-17 (Mo. banc 1994).

C.

In his third claim under his eighth point, Weaver argues the trial court erred in overruling objections to the admission of photographs seized during the search of the Shurns' residence and that the motion court clearly erred in denying his post-conviction motion that Westfall engaged in prosecutorial misconduct in offering the photographs in evidence. The photographs were introduced during rebuttal following testimony by defendant that he knew Daryl Shurn only "from the streets" and never met the Shurn brothers. The photographs were relevant in that they tended to impeach Weaver's testimony because he was pictured in several of the photographs. There was no error in admitting the photographs, plain or otherwise. These questions should have been properly raised on direct appeal rather than by post-conviction motion and that portion of the claim is denied for that reason. *See State v. Hunter*, 840 S.W.2d 850, 860 (Mo. banc 1992), *cert. denied* 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1992). Point VIII is denied.

IX.

Weaver argues that the autopsy report of the victim should not have been admitted into evidence because it was hearsay. One exception to the hearsay rule is that business

records, if properly identified, may be admitted. The custodian of the autopsy report testified as to its identity, the mode of preparation and that it was made in the regular course of business. On that basis, the court could receive the report in evidence. *§ 490.680*, RSMo 1994; *State v. Cheatham*, 340 S.W.2d 16, 19 (Mo.1960); *State v. Jennings*, 555 S.W.2d 366, 367 (Mo.App.1977).

X.

Under his tenth point, defendant again in violation of Rule 84.04(d) combines a series of eleven claims of ineffective assistance of counsel which he asserts should have been found by the motion court. To prevail, Weaver had to establish before the motion court that trial counsel failed to perform at the degree of skill, care or diligence of a reasonably competent attorney and that the performance was so prejudicial as to undermine the reliability of the result of the trial. *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984).

A.

The first claim is that competent counsel would have objected to Tabler's testimony that Weaver was a "hit man" because such testimony was evidence of other crimes. No evidence was adduced on this point at the post-conviction hearing. Trial counsel, though called to testify, was not asked why she had failed to object. Had an objection been made, it would have been of no avail. Tabler's testimony was reporting a statement made by the defendant in the context of explaining Weaver's involvement in the murder of Taylor. Among other justifications for admitting evidence of other crimes is where such evidence is admissible to establish motive. *State v. Oxford*, 791 S.W.2d 396, 399 (Mo. banc 1990). Evidence that Weaver

claimed to have been a killer for hire was relevant to establishing his motive for the murder of Taylor. While details of other murders may have been inadmissible, the evidence here was limited to what defendant told Tabler was his reason for involvement in this murder. Motive was a legitimate issue in the case.

B.

Weaver claims counsel was ineffective in failing to object to the giving of MAI-CR3d 313.44 (effective 1-1-87). This Court has held that instruction, when followed by MAI-CR3d 313.46 (effective 1-1-87), is constitutional and does not violate *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). *State v. Petary*, 790 S.W.2d 243, 245 (Mo. banc 1990). Here, MAI-CR3d 313.46 was given and any tinge of unconstitutionality removed.

C.

Weaver claims trial counsel was ineffective for failing to object to the prosecutor's inquiries regarding bullet holes in Weaver's body and for failing to present evidence that Weaver "was the victim of someone dissatisfied with his work" as a disc jockey. This claim was not preserved in the post-conviction relief motion and is deemed waived.

D.

Weaver next complains that counsel failed to seek a change of venue due to pretrial publicity. The trial court found that the voir dire record adequately covers that potential problem and that no prejudice resulted under *Strickland* by counsel's failure to seek a change of venue. The record supports that finding.

E.

Weaver next faults counsel for failing to bring out evidence regarding law enforcement's inadequate search for a gun. On that point, the motion court found that counsel's decision was not demonstrated to be prejudicial to the defendant's case under the *Strickland* standard. It might be added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

F.

Weaver argues that counsel was ineffective in failing to object to a police officer's testimony about a lack of gunshot residue on Weaver's hands and counsel's failure to call a highway patrol chemist. The question by the state was prompted by defense counsel's questioning regarding gunshot residue tests and the negative results of those tests. It was appropriate on redirect to ask the officers if they had any explanation for the lack of the gunshot residue. No evidence was offered at the post-conviction relief hearing that the officers were not qualified to explain what factors might reduce the possibility of finding residue. Counsel is not ineffective for failing to make an objection unless it is apparent that the objection would have been meritorious. *Six*, 805 S.W.2d at 168.

The police officers testified that, based on their experience, passage of time between firing and the time of taking the tests (in this case, four to five hours) and perspiration and the wiping of hands can cause gunshot residue to dissipate. The chemist did not directly refute those statements but testified only that the number of *519 shots fired increases the chance of finding residue, that it is possible to find residue for up to six hours, although residue is more likely found within one and

one-half hours, and that the chemist had no opinion regarding the effect of perspiration. The chemist's testimony would not have established any defense but, at most, would have marginally impeached the testimony of the police officers regarding the absence of gunshot residue. It cannot be said that counsel's alleged failure undermines confidence in the outcome of the trial. Thus, Weaver has failed to establish the prejudice prong of the *Strickland* requirement.

G.

As to the claim that counsel should have more extensively cross-examined one of the officers about the gunshot residue evidence, the motion court found that there was no evidence to support this ground presented at the evidentiary hearing. Having failed to present evidence about what more extensive cross-examination would have disclosed, the claim was properly denied.

H.

Weaver claims that counsel should have objected to the evidence and argument of the prosecutor as to why no gunpowder residue was found on him. The evidence pointed to in support of this argument was that of the chemist, who indicated that "very little data was provided" by the officers responsible for obtaining the residue tests as to when the tests were performed or the type of weapon. From this, Weaver argues that counsel should have presented evidence demonstrating that the absent data precluded the state's explanation for the absent residue. As noted above, the additional information about when the residue tests were performed and the type of weapon were not shown to undermine the officers' explanation. Counsel's failure to present evidence which would have been purely impeachment on a collateral matter of the officers' lack of attention to detail in

reporting data to the chemist is clearly within the range of conduct by competent counsel. Weaver also fails to establish prejudice on this point.

I.

Weaver complains that his defense counsel should have put on evidence to correct one member of the venire panel who, in response to a question on voir dire about her feelings regarding the death penalty, said,

> I really haven't considered it in particular cases, but just as a fact of economics of the State keeping people for life and the cost and I would think that crime would go down if the death penalty were enforced more. So I haven't really thought about it in specific cases and thought that people should get it or not.

Even though made in the presence of other jurors, the isolated response did not so permeate the trial that those jurors hearing it would be unlikely to follow the instructions. The economic cost of imposing a death sentence is irrelevant to any issue submitted to the jury. Counsel cannot be faulted for failing to present irrelevant evidence. Neither error nor prejudice have been demonstrated. The claim is denied.

J.

Weaver argues that counsel failed to impeach a physician's testimony that no bullet fragments were recovered from the victim's body by the testimony of two police officers that bullet fragments were recovered following the autopsy. In this case, there was virtually no dispute but that the victim died of six traumatic gunshot wounds to the head. The presence or absence of fragments was not necessary to establish the cause

of death. The failure of counsel to present impeachment evidence regarding the matter of the recovery of bullet fragments is not prejudicial.

K.

Finally, Weaver challenges counsel's failure to present ballistics evidence showing more than one weapon was used. The evidence presented at the post-conviction hearing showed that the evidence on this point was inconclusive as to whether more than one weapon had been used. The motion court correctly found no prejudice in failing to present that evidence. In addition, the jury could have found that both Shurn and defendant had fired shots. The possibility that two guns might have been used was consistent with the state's case and would have done nothing to advance defendant's misidentification defense. This point is without merit.

XI.

In his eleventh point, Weaver argues that he should have been permitted to file a supplemental Rule 29.15 motion after the time for filing amendments to such motion had run. The only authority cited for that proposition is *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994). In *Chambers* this Court observed that trial counsel's conduct was not ineffective in failing to object to an instruction. *Chambers* did not overrule the fundamental principle that the time limits for filing and amending pleadings under Rule 29.15 are valid and mandatory and the trial court is without authority to give additional time beyond that provided by Rule 29.15(f). *State v. Six*, 805 S.W.2d 159, 170 (Mo. banc 1991), *cert. denied* 502 U.S. 871, 112 S.Ct. 206, 116 L.Ed.2d 165 (1991); *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). The motion court did not err in failing to permit a supplemental amended Rule 29.15 motion.

XII.

Christine Coslick testified that on July 6, 1987, at about 7:45 a.m., while watching from her apartment in the Mansion Hills apartment complex, she saw a black male being chased by two other black males down a nearby hill into a wooded area. One of those giving chase was wearing a maroon shirt. She heard shots from the wooded area, saw the two black males return to the car and then saw the one in the maroon shirt go back to the woods. She heard additional shots, saw the man in the maroon shirt return to the car and then observed the vehicle leave. The man in the maroon shirt came within fifty yards of Coslick. Later that same day, she viewed a lineup. At the lineup, Coslick remembered not only the shirt but the general build of the individual. The person she identified was defendant.

Witness Robert Mackin testified that on the same date at the same time he was laying in bed in his apartment and heard shots. Upon going to the window, he saw two men walking briskly away from the wooded area, one of whom appeared to be in a "dark red outfit." This individual went back to the car then returned to the wooded area where Mackin heard three more gunshots. That day Mackin was taken to a lineup where he picked out the defendant based on stature and clothing.

Weaver argues that because he was the only person in the lineup wearing maroon or red clothing, the trial court should have suppressed the identification. In order to succeed on this claim, he must carry a burden of proof that there was a "very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977).

Lineups have been held not to be impermissibly

suggestive merely because of the color or characteristics of the clothing of persons in the lineup. *State v. Tringl*, 848 S.W.2d 29, 32 (Mo.App.1993); *State v. Morant*, 758 S.W.2d 110, 117 (Mo.App.1988); State *v. Howard*, 699 S.W.2d 58, 59 (Mo.App.1985). The rule seems to be that a lineup will be impermissibly suggestive only if the clothing is the sole basis for identification.

The linchpin of due process in identification procedures is reliability, not suggestiveness. *Manson*, 432 U.S. at 114, 97 S.Ct. at 2253. Here the witnesses relied not only on the color of clothing but of defendant's general build and appearance. Both witnesses had an opportunity to view Weaver at the time of the crime. Both witnesses' attention had been turned to Weaver because of the gunshots. Their identification of Weaver was consistent with their description. Both witnesses expressed a rather high level of certainty at the confrontation. The confrontation occurred the same day as the shooting. Under the totality of the circumstances, their identification has sufficient indicia of reliability. *See State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989). It is true that in the case of both witnesses, identification was based largely on general build and clothing. However, it cannot be said on the record here that a "very substantial likelihood of irreparable misidentification" occurred. Short of such evidence, courts rely on the good sense and judgment of jurors for determining the trustworthiness of the identification.

> Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.... The defect, if there be one, goes to weight and not to substance.

Manson, 432 U.S. at 117, 97 S.Ct. at 2254.

Weaver further complains about the identification of defendant near the scene where he was arrested by the officer who pursued the vehicle in which defendant was riding. After defendant was arrested, he was brought back to the crime scene. He now argues that this procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

To repeat, the linchpin of due process in identification procedures is reliability rather than suggestiveness. The reliability of identification is greatly enhanced by returning a freshly apprehended suspect to the scene of an offense for prompt identification by eyewitnesses. *State v. Pettit*, 719 S.W.2d 474, 477 (Mo.App.1986); *see also State v. Jackson*, 477 S.W.2d 47, 51-52 (Mo.1972). The identification by the pursuing officer at the scene was not impermissibly suggestive or unreliable.

XIII.

After the crash, police found keys in the Shurn vehicle. In the meantime, Weaver's car, a Buick LeSabre, was found in the Mansion Hills parking lot. The LeSabre was towed from the parking lot and placed in police custody. The keys found in the Shurn vehicle were tried and found to fit the doors, ignition, glove box and trunk of the LeSabre.

Weaver argues that no circumstances justified a warrantless search of his vehicle. Weaver does not seem to challenge the warrantless seizure of the vehicle. Here the vehicle was seized at the scene of a murder and was apparently used by Weaver as transportation to the scene of the crime. That justified the warrantless seizure of the vehicle.

Checking the locks of the LeSabre to see if the keys

found in the Shurn car fit the car found at the scene of the crime was not an unreasonable intrusion or violation of any expectation of privacy. Simply trying a key in an exterior lock of an automobile does not constitute a search. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th cir. 1991); *United States v. Lyons*, 898 F.2d 210, 212-13 (1st cir. 1990); *United States v. Grandstaff*, 813 F.2d 1353, 1358 n. 5 (9th cir. 1987). Because the officers had probable cause to seize the vehicle, they could also have searched the interior of the car for weapons and other instrumentalities of the crime without obtaining a warrant. *Chambers v. Maroney*, 399 U.S. 42, 48-52, 90 S.Ct. 1975, 1979-82, 26 L.Ed.2d 419 (1970). This would include opening the glove box. This point is denied.

XIV.

Weaver claims that the composition of the grand jury resulted from systematic exclusion of nonwhites, resulting in underrepresentation of African-Americans. Essentially the same data supporting the claim were submitted in *State v. Shurn*, 866 S.W.2d 447, 455 (Mo. banc 1993). There the data were held to be unpersuasive. No precedential value would be gained by reconsidering the claim here. The point is denied.

XV.

Weaver's fifteenth point makes a four-pronged attack on the constitutionality of the death penalty. He claims it is unconstitutional because of (1) vagueness of the aggravating factor of "depravity of mind," (2) inadequacy of proportionality review, (3) unrestricted prosecutorial discretion, and (4) failure of the death penalty to serve legitimate government purposes.

Weaver claims the "depravity of mind" aggravating factor is excessively vague.

We do not have to decide whether, in this case, the depravity of mind aggravating factor was excessively vague because the jury found two valid statutory aggravating circumstances under § 565.032.2(12). They found he murdered a potential witness and acted as an agent for another. We will affirm a death sentence based on the finding of one valid statutory aggravating circumstance, regardless of the failure of another. *State v. Sloan*, 756 S.W.2d 503, 509 (Mo. banc 1988), *cert. denied* 489 U.S. 1040, 109 S.Ct. 1174, 103 L.Ed.2d 236 (1989).

The claim of unconstitutionality in the proportionality review must also fail. The constitution does not require proportionality review. Rather, it is required by statute. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied* 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1993); *§ 565.035*, RSMo 1994. This Court has rejected the argument that it must engage in a statistical analysis of cases to determine whether the punishment is disproportional. *Ramsey*, 864 S.W.2d at 327-28. The Court's method of proportionality review does not violate Weaver's due process rights, his right to a fair trial or his right to be free from cruel and unusual punishment under the state or federal constitutions.

Similarly, no authority is cited or found holding that the prosecutorial discretion to seek the death penalty is unconstitutional. This claim lacks merit and has been rejected on numerous occasions. *Parker*, 886 S.W.2d at 933; *Ramsey*, 864 S.W.2d at 330; *see also Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976).

The final claim under Point Fifteen is that the Missouri death penalty statute violates Weaver's constitutional rights because no legitimate government goal is advanced by such punishment and it is, therefore, excessive. This claim, too, has been repeatedly rejected and no precedential purpose would be

served in discussing it again here. The claim is denied.

XVI.

In his sixteenth point, Weaver argues that the judgment in the post-conviction hearing was invalidated because "most of the 'findings' either adopted verbatim or with only minor editorial changes [the state's] proposed findings." This Court's review is limited to determining whether the motion court clearly erred. *Rule 29.15(j)*. While trial courts must act independently in making findings of fact and conclusions of law, it is not error for a trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings. The point is denied.

XVII.

Various claims are raised in his seventeenth through twenty-first points which have been argued and found to be without merit in recent cases before this Court. Specifically, Point XVII argues that our pattern instructions, which tell the jury "If you do not find the defendant guilty of murder in the first degree, you must consider whether or not he is guilty of murder in the second degree." is an "acquittal first" instruction and violates due process. This claim has recently been denied. *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994), *cert. denied* 513 U.S. 1093, 115 S.Ct. 757, 130 L.Ed.2d 656 (1995). In Point XVIII Weaver argues that he was denied due process because individual voir dire was not allowed of the jurors. This Court has repeatedly rejected that claim. *Parker*, 886 S.W.2d at 921; *State v. Whitfield*, 837 S.W.2d 503, 509 (Mo. banc 1992); *State v. Ervin*, 835 S.W.2d 905, 917 (Mo. banc 1992). In his nineteenth point, Weaver claims that he should have a separate jury to determine punishment. This claim has also often been rejected by this Court. Weaver's twentieth claim is that the trial court erred in failing to give a non-MAI cautionary instruction.

Again, that claim has recently been denied. *Parker*, 886 S.W.2d at 921; *State v. Kilgore*, 771 S.W.2d 57, 63 (Mo. banc 1989). Finally, Weaver challenges the instruction on reasonable doubt. This complaint has been presented and denied on numerous occasions. No precedential value would be served by further discussion of the final five points. *See Rule 84.16*. The claims are denied.

XVIII.

The Court has examined the evidence in this case and determines that the sentence, when compared to similar cases, is neither excessive nor disproportionate. *See Shurn*, 866 S.W.2d at 467; *Parker*, 886 S.W.2d at 933-34; *State v. Williams*, 652 S.W.2d 102, 113-14 (Mo. banc 1983); *State v. Blair*, 638 S.W.2d 739, 759-60 (Mo. banc 1982), *affirmed* 459 U.S. 1188, 103 S.Ct. 838, 74 L.Ed.2d 1030 (1983). In each of the above cases, defendants were sentenced to death who had murdered victims who were witnesses or potential witnesses.

CONCLUSION

The judgment imposing the death penalty for murder in the first degree is affirmed. The judgment denying relief from the post-conviction relief proceeding is affirmed.

John C. Holstein, Chief Justice

BENTON, PRICE, LIMBAUGH, ROBERTSON and COVINGTON, JJ., and EDWARDS, Senior Judge, concur.

WHITE, J., not participating because not a member of the Court when case was submitted.

IN THE CIRCUIT OF ST. LOUIS COUNTY
STATE OF MISSOURI

WILLIAM L. WEAVER, Movant,	)	
	)	Cause No. 603615
vs.	)	Division 15
	)	
STATE OF MISSOURI, Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINDINGS OF FACT

1. On September 15, 1988; the Jury found William L. Weaver guilty of murder in the first degree and subsequently sentenced to death.

2. William Weaver was represented by Ms. Doris Black, Attorney at Law.

3. November 27, 1989; William Weaver filed this post-conviction motion pursuant to Missouri Supreme Court Rule of Criminal Procedure 29.15.

4. May 9, 1990, movant, filed an amended motion.

5. Numerous discovery efforts were made by movant's appointment attorney which resulted in various depositions of witnesses being taken, and also which resulted in the filing of various Motions to Compel, Motions for Sanctions, Motions to Quash and Motions to

Dismiss.

6. December 1, 1992; Motions to compel, sanctions, quash and dismissal were over ruled.

7. December 17, 1992; Motion to reconsider the ruling of December 1, 1992, over ruled.

8. May 26, 1993, Senior Judge Herbert Lasky assigned T case.

9. On September 8, 1993, movant filed a Supplemental Motion to Vacate his Sentence and Judgment and a Motion to Reconsider Order of December 1, 1992.

10. September 13, 14 and 15, 1993, the Court held an evidentiary hearing, at which time it was continued to be reset caused by the unavailability of a witness.

11. September 29, 1993, proceedings were suspended pending the outcome of a Writ of Probation.

12. March 2, 1994, after the Writ was resolved, the Court overruled movant's Motion to Reconsider the December 1, 1992, order denying Movant's Motion to Reconsider.

13. April 12, 1994, discovery inspect in conference held.

14. July 7, 1994, the Court sustained the State's objection to the filing of movant's Supplemental Motion to

Vacate his Judgment and Sentence as untimely under Rule 29.15.

15. The evidentiary hearing concluded on July 28, 1994, with leave being granted to movant to file an affidavit by July 15, 1994.

16. Point one (1): Movant's pro se motion alleges that his trial attorney, Ms. Doris Black, was ineffective in not calling Mr. Carl Rothove as an expert witness to testify about gunshot residue. Mr. Rothove testified at the evidentiary hearing, the Court finds that the witness testimony was speculative. Movant has failed to demonstrate any prejudice on this issue. Point denied.

17. Point two (2): Movant's trial counsel failed to object and move for a mistrial when the State presented the testimony of Robert D. Tabler who testified that movant admitted to him that he had killed other people. The Court finds that objection and request for a mistrial would not have been granted had Ms. Black made such an objection, her failure to do so is not ineffective assistance. Point denied.

18. Point three (3): Counsel's failure to request a change of venue. Movant carried the burden to prove that such a request would have been granted or was appropriate. Point denied.

19. Point four (4): Counsel's failure to object to the prosecutor referring to movant as a Hit Man. The Court finds that the objection would not have been sustained. Point denied.

20. Point five (5): The failure of counsel to object to the aggravating circumstance that the murder involved torture or depravity of mind. Movant bases his allegation on the Report of the Trial Judge which state that there was no torture. The Court finds supporting evidence. Point denied.

21. Point six (6): Movant's pro se petition alleges ineffective assistance based upon counsel allowing the jury to be influenced by passion, prejudice and other arbitrary factors. Movant fails to plead facts which, if true, would entitle him to relief. He has pleaded only conclusions in this point. Denied.

22. Point seven (7): Movant's pro se petition alleges ineffective assistance in that counsel allowed the prosecutor to state to the jury that the victim was killed because he was a potential witness. Movant claims that there was no evidence that movant knew of that status. The point fails to allege what his counsel should have done. The Court finds there was sufficient evidence that movant's codefendant knew and movant was charged to have acted together with him. Point denied.

23. Point eight (8): Counsel failed to object to testimony that bullets taken from the victim's head were .357 caliber. No evidence was presented. Denied.

24. Point nine (9): Counsel's failure to request a mistrial when the prosecutor questioned a witness in regard to the identification on the defendant. Sufficient facts have not been alleged from which it can be determined that if true, would he be entitled to relief. Point denied.

25. Point ten (10): Counsel's failure to request mistrials during the State's closing argument because of the prosecutor's prejudicial remarks. The Court finds nothing improper within the State's closing argument. Point denied.

26. Point (3-A): Movant's amended motion alleges that movant was denied his right to an independent and impartial trial judge because Judge Voorhees, the trial judge, failed to recuse himself when he had been the trial judge who presided over the codefendant's trial. Subparagraph (i) alleges that Judge Voorhees should have allowed individual voir dire. This is a matter which is discretionary with the Court and so this sub-point fails. Subparagraph (ii) alleges that Judge Voorhees was prejudiced by having heard the testimony from the codefendant's trial. Movant merely speculates that it was "reasonably likely" that Judge Voorhees was impacted by the prior trial's evidence and movant has failed to present evidence that Judge Voorhees actually was impacted by it. Point denied.

27. Point (3-B): Movant's amended motion alleges trial error by the Court for refusing to give an instruction. This is not a cognizable issue for a 29.15 motion and is an issue for the trial appeal. Denied.

28. Point (4-A): Counsel's failure to adequately challenge the Grand Jury selection procedures of St. Louis County. Movant pleads conclusion here, not facts. Movant fails to state what counsel would have discovered in an "adequate" investigation. Point denied.

29. Point (4(b): Counsel's failure to challenge the petit jury selection procedures of St. Louis County. Movant has failed to plead facts which would entitled him to relief on this point. Denied.

30. Point 4 (c): Counsel's failure to challenge the procedures of St. Louis County for excusing qualified jurors. Movant claims that the current procedures systematically exclude black men and women of all colors. Movant presented no evidence to support this claim. Point denied.

31. Point 4 (d) (i): Counsel's failure to investigate and present evidence that the Prosecuting Attorney for St. Louis county exercises his discretion in death penalty cases in an arbitrary, capricious, and discriminatory manner. The Court finds that the prosecutor attorney did not abuse his discretion. Point denied.

32. Point 4 (d) (ii): Counsel's failure to challenge the Supreme Court's proportionality review of murder cases. The Supreme Court complied with the requirements of Section 565.035 RSMo. Point denied.

33. Point 4 (e) (i): Counsel's failure to investigate and present various evidence. Movant fails to plead facts which would if true, entitle him to relief. Point denied.

34. Point 4 (e) (ii): Counsel's failure to adequately investigate the background of Robert Tabler and the deal he struck in exchange for his testimony. Movant alleges that his counsel would have done a better job of cross-examination has she done the things he now alleges. The

Court finds that Ms. Black did an excellent job of cross-examination on Robert Tabler. Point denied.

35. Point 4 (e) (iv): Assistance based upon Counsel's failure to object to the testimony of Robert Tabler that movant has admitted to him that he was a Hit Man and has committed prior murders at the direction of others. The Court notes that counsel objected at trial and included the ground in the Motion for New Trial. Point denied.

36. Point 4 (e) (v): Counsel's failure to have movant try on the tennis shoe in the trial to show that it did not fit. No evidence was presented in the evidentiary hearing to support this ground. Point denied.

37. Point 4 (e) (vi): The amended motion alleges ineffective assistance based upon counsel's failure to present evidence of motel records. No evidence was presented on this point in the evidentiary hearing. Point denied.

38. Point 4 (e) (vii): Counsel's failure to present evidence of an expert on eyewitness identification to rebut the testimony of the State's witnesses. No evidence on this point was presented at the evidentiary hearing. Point denied.

39. Point 4 (e) (viii): Counsel's failure to cross-examine Detective Cantwell more extensively abut the gunshot residue evidence. No evidence to support this ground was presented at the evidentiary hearing. Point denied.

40. Point 4 (e) (ix): Counsel's soliciting and/or failure to object to the testimony of Detectives Lee and Cantwell about the results of the gunshot residue tests. The negative result is consistent with movant's defense. Point denied.

41. Point 4 (e) (x): Counsel's failure to object to the testimony about the gunshot residue tests results, with specific Point 4 (e) (x), no evidence was presented at the evidentiary hearing to support the allegation. Point denied.

42. Point 4 (e) (xi): Counsel allowing Cantwell to testify that no identifiable fingerprints had been found because he is not an expert on latent print examination. No evidence presented to support this allegation that identifiable prints were found or to introduce evidence that any were found. Point denied.

43. Point 4 (e) (xii): Counsel's failure to elicit from Cantwell the testimony he gave at the Shurn trial about how exhaustive the search for weapons was. The jury heard that no gun was found. This was consistent with movant's defense. The Court finds no prejudice. Point denied.

44. Point 4 (e) (xiii): Of the amended motion alleges ineffective assistance based upon Counsel's failure to call an expert to testify that the bullets recovered from the victim could have been either .38 or .357 caliber. The Court finds no prejudice. Point denied.

45. Point 4 (e) (xiv): Counsel's failure to

investigate the involvement of Detectives Dobbins and Leyshock. There was no evidence offered in support of this allegation at the evidence hearing. Point denied.

46. Point 4 (e) (xv): Counsel introducing evidence that the victim's briefcase contained a gun. The possibility that the victim would have had other enemies fits movant's defense strategy that someone else committed the murder. There is no prejudice shown. Point denied.

47. Point 4 (e) (xvi): Of the amended motion alleges ineffective assistance based upon Counsel's failure to object to the testimony of threats that the victim had hear. An objection would not have been successful. Point denied.

48. Point 4 (e) (xvii): Counsel's failure to ask for a continuance to investigate Det. Leyshock's testimony that he had heard on the streets that the victim's life has been threatened. No evidence was presented at the evidentiary hearing on this claim. Point denied.

49. Point 4 (e) (xviii): Of the amended motions alleges ineffective assistance based upon counsel's failure to object to Instruction No. 12. No evidence was presented at the hearing on this claim but the Court notes that objections to instructions need not be made at trial to preserve the issue for appeal. This claim is therefore not cognizable here. Point denied.

50. Point 4 (e) (xix): Counsel's failure to object to the testimony of Det. Leyshock, and the testimonies of

Assistant United State Attorney Debra Herzog and J. Bennett Clark to a "confrontation" that occurred at the Federal Courthouse between Larry Shurn and the victim. The Court notes that this point is included in the Motion for New Trial dn is therefore preserved for appeal and not cognizable here. Point denied.

51. Point 4 (e) (xx): Counsel's failure to call Mr. C. Clifford Schwarts to testify that he witnessed the encounter above and that he dd not see anything threatening about it. Mr. Schwarts testified at the evidentiary hearing and could not say that the "thumbs down" incident did not occur, only that while he was watching it did not occur and that he was not watching the whole time. His testimony trial would not have changed the outcome. Point denied.

52. Point 4 (e) (xxi): Counsel's failure to prevent Dr. Turgeon from testifying since he was endorsed on short notice due to Dr. Gantner's illness. The Court notes that this issue is included in the Motion for New Trial and so is therefore not cognizable here. Point denied.

53. Point 4 (e) (xxii) and 4 (e) (xxiii): Are denied no evidence was presented on either point in the evidentiary hearing.

54. Point 4 (e) (xxiv): Counsel's failure to introduce movant's arrest records to show that he had never been arrested in possession of drugs, large sums of money, fancy cars or weapons. No evidence was presented at the evidentiary hearing on this claim. Point denied.

55. Point 4 (f): Counsel's failure to peremptorily

strike juror James Smith at movant's request due to his prior relationship with Larry Freeman, the prosecutor's investigator. No evidence that movant made such a request was presented at the evidentiary hearing. Point 4 (f) also alleges that movant was not present at the instruction conference. He does not have a constitutional right to be present. Point denied.

56. Point 4 (g): Counsel's failure to adequately voir dire on aggravating and mitigating circumstances. Movant fails to allege what counsel should have asked or how she should have conducted her voir dire. Further, there was not evidence presented at the evidentiary hearing to support the claim that the jury weighted only those aggravating and mitigating circumstances which they has unanimously found to exist. Point denied.

57. Point 4 (h): Counsel offering Instruction No. 25 and in not objecting to its form because it precluded jurors from considering a mitigating circumstance unless it was found to exist by all twelve jurors. As noted earlier, objections to instructions need not be made at trial in order to preserve the issue for appeal. Counsel cannot be ineffective in failing to object when no objection is necessary. In addition, the jury was instructed that they did not have to give the death penalty.

58. Point 4 (i): Of the amended motion alleges ineffective assistance based upon Counsel's failure to rehabilitate jurors Boehn, Abdelmeguid, Gralnick and Tipple. Movant has failed to plead facts and failed to present any evidence. Denied.

59. Point 4 (j): Counsel's failure to seek a change of venue because of pretrial publicity. The voir dire records adequately covers that potential problem. The Court finds no prejudice or bias.

60. Point 4 (k): Counsel's failure to object to certain questions from the prosecutor on voir dire. The Point goes on to allege that movant was prejudiced because the jury was misled. The Court finds no prejudice. Point denied.

61. Point 4 (l): Counsel's failure to object to Instruction No. 23 because it included the aggravating circumstances that the murder involved "depravity of mind" which movant claims is unconstitutionally vague. Movant's support for this is the jury's note that they wanted a definition for it. The Court again notes that no object is required to preserve the issue for appeal.

62. Point 4 (m): Counsel's failure to provide evidence for a pretrial motion. Movant has not pleaded facts to support this allegation, no evidence offered at the evidentiary hearing. Movant also claims that the lack of child care resulted in several jurors being excused for cause thus depriving him of a jury representative of a fair cross-section of the community. The constitutional guarantee of a fair and impartial jury is measured by the actual jury that is seated for the trial. Movant has not presented any evidence that the jury which heard the case was not a fair representation of cross-section of the community. Point denied.

63. Point 4 (n): Counsel's failure to challenge the

presentence investigation and the Court's consideration of same. The Court is presumed to ignore inadmissible and inflammatory comments in a presentence investigation and so therefore this claim is without merit. Point denied.

64. Point 5 (a): Alleges prosecutor misconduct and includes a long list of things that the prosecutor failed to disclose. After a thorough review of the testimony from the evidentiary hearing as well as **in camera** inspection of the prosecutor's trial file, this Court finds no merit in movant's claim. Point denied.

65. Point 5 (b): Alleges prosecutor misconduct by the prosecutor asking witnesses certain questions on cross-examination and in presenting certain evidence with the sole purpose being to inflame the jury's prejudices against movant. A wide latitude is given to an attorney on cross-examination. This Court finds, after review of the allegations within the context of the trial, that there is no merit to movant's claim in Point 5(b). The prosecutor did not do the things complained of for the sole purpose of inflaming the passions of the jury, but for legitimate purposes such as impeaching defense witnesses, attacking their credibility, and proving that movant and Shurn were more than mere innocent acquaintances. Point denied.

6. Point 5 (c): Alleges prosecutor misconduct in that the prosecutor's closing arguments violated movant's rights to a fair trial and due process. Movant claims that the arguments in both phases were improper. The prosecutor's arguments were not calculated to mislead the jury, not were they calculated to inflame the juror's passions. The prosecutor properly argued the reasonable

inferences from the evidence and properly argued that the death sentence could be a deterrent to commission of future crimes. The prosecutor's arguments were legitimate appeals to the jury to impose the maximum sentence. Point denied.

67. Point 5 (d): Is included in movant's Motion for New Trial. Point denied.

68. Point 6: Of the amended motion alleges that the jury saw movant in shackles. There was no evidence presented on this claim at the evidentiary hearing, nor were facts pleaded in the motion which demonstrate that any prejudice occurred. Point denied.

69. Point 7: Of the amended motions alleges that the trial court poisoned the minds of the Supreme Court by submitting the Report of the Trial Judge with attached comments by the prosecutor. Point denied.

70. Point 9: Of the amended motion alleges that the cumulative effect of all the above claims violates movant's rights. Point denied.

CONCLUSIONS OF LAW

1. In a motion for post-conviction relief, movant has the burden of establishing his right to relief by a preponderance of the evidence.

2. Where an evidentiary hearing is granted, any allegation about which no evidence is offered is deemed abandoned.

3. When movant claims ineffective assistance of counsel, he must demonstrate that counsel's performance was deficient and that he was prejudiced therefore. "Deficient" means less than the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances. "Prejudice" means that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

4. Counsel is presumed to have rendered adequate assistance, and to have made all significant decisions in the exercise of reasonable professional judgment.

5. Matters of trial court error, instructional error, and any other matters preserved for direct appeal should not be consider in a post-conviction proceeding.

6. Movant cannot raise matter of trial error without alleging and ultimately proving that the grounds amount to constitutional violations and that exceptional circumstances exist to justify not raising those ground on direct appeal.

7. Movant has failed to establish by a preponderance of the evidence that there was a reasonable probability that the result would have been different has his attorney acted in a manner other than as alleged.

8. Movant has failed to establish by a preponderance of evidence that he is entitled to the relief sought.

9. Movant has failed to demonstrate that his trial

counsel gave a deficient performance.

10. Movant has failed to overcome the presumptions of competency of his trial counsel.

11. A Court may take judicial notice of its files and records in a post-conviction proceeding.

12. The failure to object does not rise to the level of ineffective assistance of counsel unless movant has suffered substantial deprivation o the right to a fair trial.

13. Movant did not suffer a substantial deprivation of the right to a fair trial as a result of trial counsel's alleged failure to object.

ORDER

WHEREFORE, after being fully advised in the premises, it is the Order of the Court that the motion of William Weaver, filed pursuant to the provisions of Missouri Supreme Court Rule 29.15, to set aside his conviction and sentence in Cause No. 565118B in the Circuit Court of the County of St. Louis, State of Missouri, is Overruled and Denied.

SO ORDERED:

_____

Honorable Herbert Lasky, Sr. Judge

Entered this 29th day of Nov., 1994.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent, vs. WILLIAM L. WEAVER, Appellant.	))))))	No. 71051

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, STATE OF MISSOURI
Honorable Alphonso H. Voorhees, Judge

STATE OF MISSOURI, Plaintiff, vs. WILLIAM L. WEAVER, Defendant.	)))))))	Case No. 565118B Division No. 13

TRANSCRIPT ON APPEAL

VOLUME V

Mr. George Westfall
Prosecutor Attorney
St. Louis County Circuit Court
7900 Carondelet
Clayton, MO 63105
Attorney for the State

Doris Gregory Black
Attorney at Law
3534 Washington Ave.
St. Louis, MO 63103
Attorney for Defendant

Reporter: Patricia K. Davis, CCR

CLOSING ARGUMENT ON BEHALF OF THE STATE

MR. WESTFALL: Ladies and gentlemen, in a little while longer, the case will be in your hands for the punishment and then the whole trial will be finished. Don't look back on your verdict. You people made the right decision last night. You knew it when you made it. Don't look back on it. Don't let Mr. Weaver get into your mind and play games by telling you he's innocent, hoping that that will make you say life rather than death simply because there is some possibility that he's innocent.

The State's case - - the evidence in this case once you threw out all the smoke screens and evaluated his perjury that his people put on, his guilt was obvious and you arrived at that verdict. Don't second-guess your verdict. I mean I think you should be offended by the fact that he's still maintaining his innocence. It's obvious why he's doing it. He wants you to second-guess your verdict and spare his life on that basis alone.

If you want to spare his life, that's your discretion; that's your decision. But do it for the right reasons, not the wrong ones. He's guilty and you know it. So don't let him get into your brain. Don't let him do that to you. He can't admit his guilt because then he'd be in real trouble because he'd be telling you he's a hit man. So he's telling you still that he's not guilty, but he's hoping that by saying that you'll come off the death penalty.

Maybe this is an exercise in futility. Maybe I'm wasting my time in even talking to you about death because maybe your minds have already been made up. I know there's been a lot of crying going on. I can understand that. But I know what my responsibilities are and I know what the right punishment is in this case. So, if I'm wasting my time, I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here.

I could have called Mrs. Charles Taylor to the stand. I could have asked Mrs. Taylor, you know, did you love your husband? Yes, I loved him. Was he good to you? Yeah, he was a good husband. Do you still love him? Yeah. Do you miss him? Sure, I miss him. And she probably would have started crying. I could have brought some relatives and friends of Charles Taylor's and asked them: Do you miss Charles? Was he a decent man?

But that's not really what's at stake here. She gets to visit him at the cemetery. You can let Mr. Weaver's friends and relatives visit him in the penitentiary? He killed Charles Taylor in cold blood, six bullets in gang-land execution style; and, yet, you're going to let his people visit him at the penitentiary? And Charles Taylor's people have to go to the grave to visit him.

You've got the remember what we're dealing with here. This is bigger than William Weaver. It's bigger than Daryl Shurn. It's bigger than all of us. The crime that occurred July the 6th of last year is our worst nightmare. It's the crime that strikes right at the core of society. It scarces us all. The execution of witnesses in a

Federal drug case.

MS. BLACK: Objection to the term used, "execution," Your Honor. It's improper closing.

THE COURT: Overruled.

MR. WESTFALL: It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the William Wavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well it was right to kill then and it's right to kill him now.

If Jerry Leyshock had just on a hunch gone there that morning because of his conversation with Charles Taylor, "the street talk is that Shurn's coming after me," and just went out there on a hunch and he saw what was happening and he was able to kill the two of them before they killed Charles Taylor - -

MS. BLACK: Objection, Your Honor. This is totally im proper argument. I want to make a record on this. I'd like to make a record.

THE COURT: I will save you time and I will sustain the objection.

MS. BLACK: I ask the jury to instructed to disregard it.

THE COURT: The jury will disregard the portion of the argument regarding Mr. Leyshock appearing at the scene and doing certain things.

MR. WESTFALL: I'll leave you with Charles Taylor. Would you have said he was right in killing them if he could have saved his own life? Of course, you would. So I'll take their lives, Mr. Weaver's life for what he did to Charles Taylor a year ago.

The Shurn family? Scum, rock bottom scum. Selling drugs, PCP, heroin. High level drug people. Organized Crime Task Force prosecuting Charles and Larry last year. Charles Taylor is a witness for the State. And who does this high level drug family choose to do their execution, do their killing? They choose William Weaver. Don't lose sight of that fact. A high level drug operation chooses William Weaver to do their killing.

Now, obviously, these people that came in here today - - and I feel sorry for them. They are all decent people and they obviously don't know the William Weaver that was in business July 6th of last year. They know the

Dr. Jekyl side of him. They don't know the Mr. Hyde. We obviously have a man here that on one hand can do things to fool the world while on the other hand he's a cold-blooded executioner.

I can't emphasize too much don't second-guess you verdict in that regard. It was the right verdict and you know it and you're comfortable with it. Now, the only decision is should his life be spared. And I say to you: Why should it be? When you were selected as jurors, you all said, yes, in the right case I can give the death penalty. And one or two of you even said you would favor the death penalty in the right case. Well, if this isn't it, what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? So if you were being honest to me when you said that, then that has to be the case.

MS. BLACK: Objection, Your Honor. That calls for improper argument. May be approach the bench, please?

MR. WESTFALL: Judge, would you save my time?

(Counsel approached the bench and the following proceeding were had:)

MS BLACK: I object to the State using this somewhat threatening statement to the jury that if they don't come back with death in this particular case, then there's no other case that they could come back with a death for and would come back with death for. I think it's improper argument to this jury. It is intended to impose

fear and intimidation on this jury into arriving at a verdict of death. And I ask this jury - - the judge to sustain the objection and instruct the jury to disregard his last comment and to admonish counsel against making those kids of comments to the jury.

MR. WESTFALL: Judge, I'm simply speaking hypothetically that if this isn't the case that calls for a death penalty, what type of case would?

THE COURT: I'll overrule the objection.

(The proceedings returned to open court.)

MR. WESTFALL: If this isn't a case that calls for the death penalty, I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said that you would prefer it, that you would favor it in the right case. This is the right case.

William Weaver ran out of bullets. Think back to the evidence. I'm sure you discussed it yesterday. But when you discuss his fate, think about the evidence. He ran out of bullets and Charles Taylor was still alive. So when they go back, he's reloading. All six spent casings are on the floorboard right where he was and he's reloading while Daryl is driving and they stop and he goes back and shoots him some more. Then I'm going to tell you that he was out of bullets, because if he hadn't been, Officer Crain would have been dead because he would have kept the gun on him instead of pitching it out of the car.

MS. BLACK: I'm going to object, Your Honor. There's no evidence that William Weaver threatened Officer Crain or had a gun when he saw Officer Crain. This is totally improper argument.

THE COURT: Overruled.

MS. BLACK: And prejudicial.

MR. WESTFALL: Judge, this is argument.

THE COURT: Overruled.

MR. WESTFALL: If he had still had the gun and still had bullets, do you think he would have sure surrendered as meek as a lamb? I mean, of course, he wouldn't have surrendered. What if Jean Henson would have been jogging a little bit later than she was and coming around the woods or the clearing at the time of the murder and he still had some bullets. You think she would be alive?

MS. BLACK: I'm going to object, Your Honor. This is improper. It's intending to invoke sympathy and outrage by this jury. There's no evidence that the person who killed Charles Taylor ever tried to kill Jean Henson. There's no evidence of that.

THE COURT: Overruled.

MR. WESTFALL: You know this is closing argument and I'm giving you what I think is a logical inference. If a hit man is interrupted during the middle of

his execution, do you think he's not going to kill the witness? Hit men don't have records. Do you know why? Because hit men don't leave victims. They kill their victims. That's why they don't have records. They don't leave victims. And William Weaver wouldn't have left Crain alive if he could have killed him. He was going to get away - -

MS. BLACK: I want to make the same objection, Your Honor, that it may be continuing any time he refers to any killing of Officer Crain or Ms. Henson. Unless the Court wants me to object each time he makes that statement, I would like it to be continuing to that type of argument.

THE COURT: If you want the objection to be continuing anytime he mentions either of them, I think - - well, I think you'd better not make it continuing.

MS. BLACK: Well, then I'm making it again.

THE COURT: You'd better. I'll overrule the objection.

MR. WESTFALL: There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society where we can walk our streets and protect our property. Sometimes you have to be harder than they are. And this is the kind of case where you're going to have to return that sort of a sentence.

You've got to give the message to the Shurns and the Weavers of the world that we just won't tolerate it and we have got the guts to do it and we have got the backbone to do it, no matter how much crying or how much weeping there is. Mr. Weaver hasn't cried all week. When the verdict came back last night, he didn't blink. Peculiar that he's crying today when his life's on the line. Peculiar. I guess not too peculiar. He didn't blink last night when the verdict cam back. He doesn't blink. He makes other people blink. Charles Taylor crawling along the ground. There's no question in your mind what Weaver did last July. Don't lose sight of that fact. There is no question what he did.

But think about it. Think about the fear, the terror, the agony in Charles Taylor's mind as he's crawling into the woods not knowing whether he's going to live or die and not knowing if they are coming back, but knowing that he's still alive. And Weaver knew he was still alive. So Weaver had to get more bullets, had to come back and finish him with six bullets in the head. I mean they chased him down like an animal and they executed him. I mean if this isn't the case for the death penalty, then there's no case you'll do it. You've just got to reach down and do what you know is right.

There are certain times when doing what's right is tough and it will be touch in this case. But just like you won't look back on your verdict and never second-guess it, you won't look back on this either. You'll be comfortable with it. You'll be able to sleep. You'll know that you did the right thing.

Officer Gariner put his life on the line in chasing these people and he wasn't wasting his time; that's the message you want to give to the good guys in this case. The message you want to give to the bad guys is clear: Don't do it or we're going to take your life. We've got a right to do it and we're not ashamed of it and we're not embarrassed. The law says we've got the right to do it and there are times when we should and this is one of them.

But give the other message to the Gardiners of the world. He's chasing a - - it's a shooting case. His life was on the line. You want to tell him that for this kind of crime the guy goes to prison? There are other crimes the life without parole is appropriate for that are less serious than murder. I mean there are a number of crimes where somebody should spent the rest of their life - -

MS. BLACK: You Honor, there is no other crime that life without parole would apply to. It is only Murder First Degree.

MR. WESTFALL: Judge, I'm giving my opinion, not stating what the law is.

MS. BLACK: It's a misstatement - -

THE COURT: Sustained.

MS. BLACK: I ask the jury be instructed to disregard that statement.

THE COURT: The jury will disregard the statement stated there are other crimes for which life without parole

is the punishment. You may proceed.

MR. WESTFALL: Don't cry for William Weaver. If you're going to shed some tears, cry for Charles Taylor and his family. We always lose sight of the victim because the victim's in the grave. All we see of the victim is a bloody picture. He lived. He had some happy moments, some sad moments. He's dead. His family - - he's gone forever. Why should William Weaver get to live? I don't understand that. Why should William Weaver get to live?

And when he did it for the reason of money, of greed, he was an agent. I mean he's was a hit man. So he was getting paid something for this. We can't prove how much or that money changed hands, but you know that from your verdict. I hope you're going to do it. I hope you've got the guts to do it.

Put in the form the aggravating circumstances that you find. All four of them apply. He was getting profit; that's number one. He was acting as an agent for the Shurns; that's number two. A Federal witness, number three. And violent wanton, inhuman - - what could be worse than the way in which Mr. Charles Taylor was killed? So put all four in your verdict. I hope that you've got the guts to do it.

THE COURT: You have three minutes remaining.

MR. WESTFALL: Thank you, Judge.

This case - - I guess it's one that just cries out to

you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.

When it comes time after Ms. Black talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just go to toughen up and do what's right, even though it's going to be touch. You've got to say this is bigger than William Weaver. It's not personal; it's business. Just like you did it last year; you were taking care of business. Now we're going to do it legally. We're going to do what the law says and we're going to take care of business. We sentence you to die.

CLOSING ARGUMENT ON BEHALF OF DEFENDANT

MS BLACK: Ladies and gentlemen of the jury, I'm not going to stand here and say I agree with your verdict. I'm sorry, I can't do that. Because I do still believe that William is innocent. So I can't lie to you and just stand here and say you did the right thing. Probably - - I would have to say you probably did what you believe is right. You know, I hope I can say that. I don't agree with it and I truly believe that some day, however many years away after he's been locked up assuming his life is spared, I do believe that the truth will come out. I do believe some evidence, some piece that we don't have right here, didn't have this week, maybe you didn't have the benefit of, but

I truly believe it will happen.

Buzz Westfall said something during the first part of this trial and he was talking about Mr. Wragg. And he asked Mr. Wragg, "Are you a hundred percent sure?" And Mr. Wragg said "Yes, I'm a hundred percent sure that the man had on a burgundy sweatsuit." And Westfall talked about Mr. Wragg because he dared to say he was a hundred percent sure. He called him an arrogant fool. Well, he now tells you don't look back. Give him death. You did the right thing. You're sure. But, you, it makes you think about it. Are you ever really sure?

If somebody says you did something that you know you didn't do, but the facts look otherwise - - okay? - - it looks like you're the likely one that did it, everything's pointing to you, but you know - - I mean either you did or you didn't and you know you didn't. The fact that somebody said - - or your mother. If you were a child and your mother says, "You did it; I know you did it," and you know you didn't and you get punished for it, that didn't make you do it. It just means that the evidence looked against you. I just means that your mother didn't believe you. It just means that she believed this set of facts over what you kept saying, I didn't do it. Well, it's sort of like that here.

You went back to the jury room last night and I assume if you were so positive at the beginning you would have been back in 30 minutes, all right? but you stayed out almost four hours and I - - if I have had any belief in the criminal justice system, I have to believe that you didn't go back there and get tired and just write William

Weaver off. I have to believe you talked about it. I have to believe you agonized about it or else, you know, I'll just hang up my shingle. There's no reason to have any faith anymore. So I have to believe that when you came back here you must have said, well, Ms. Black, but we can't explain the keys or, you know, we can't explain his car being there, whatever the reason was you came to that caused you to say we don't believe William.

But what did you really say there? You 12 people said we choose to believe the clothes were like this rather than what Wragg and Ducharme said, that the man had on a sweatsuit. Because it couldn't have been both. So you must have said we choose to believe this side. But what if you're wrong you see? And there is that possibility that you are wrong because you are human, too. And if you are wrong - - and this is the kind of case where you may very well be wrong. Though you're convinced, you may be wrong. And if you have said death to William Weaver, that kind of mistake can never be undone.

But if a man is locked up and the law says life - - it used to be life without parole for 50 years. They changed it. It is life without parole. Life without probation. It is life. In case you thought, well, maybe life is 12 years, oh, no, the law changed. It is life without even the possibiltiy.

And if you were wrong - - and you are human, too - - then at least - - I don't care if it's 10 years, 15 years down the line; if we find that evidence or that person that might have seen him doing the gymnastics or somebody who said after many years - - and it happens, ladies and gentlemen - - I remember that young man, or this or that, at least he's

alive. At least he's alive, you see? At least an error, a human error can be undone. But if you have said death and they have put him in that electric chair or gas chamber and they have snuffed out the last breath of his life, it doesn't matter if we find out later that he's innocent. It doesn't matter because it's too late. It's too late then.

Now, I know that you believe you did the right thing, but you may very well have made a mistake. I know the killing of Charles Taylor was bad. We cannot disagree on that. I truly believe it's a different person. You have thought otherwise. But even then, you remember when we were voir diring you as jurors and I said to you - - I said, you know, the State will say this man was shot six times in the head, didn't I? I mean I tried to describe it as graphically as I could. And I said even with that, will you consider life? And each of you 12 said yes. Because I wanted you to know when we were picking the the jury how badly this man was killed. I wanted you to know that. And some jurors said, oh, no, it would have to be death. And many of them were excused.

So if the law can say even for a crime like this that a jury may still consider life, does that mean you're terrible if you say life? Does it? Oh, no. So don't let him make you feel that, well, if you don't say death, there's no case. Oh, no, because the law even says life may be considered. The Lord created man. I believe that, at least. And I don't believe that another human should take that life and that is perhaps my philosophical view about it. But the 12 of you have said previously, Ms. Black, we can consider death, but you also said I will consider life. Some of you were leaning more towards death when we came in here and

some of you said I lean more towards life.

I ask you now when you get back to that jury room: Fight for life, because you're human. Fight for life, because we have shown mitigating circumstances. That instruction says if you find - - you can consider whether the defendant has two children and a mother in failing heath. That wasn't a show. I wanted her to testify. William said no, no, no, not my mom. She's failing in health. You may - - the law says, not Doris - - the law says you may consider that. It says you may consider whether he's worked with young people to encourage them against engaging in crime and using drugs. The law says it, not me. The law says you may consider that.

And what have you heard? You've heard from the people who say that's the William Weaver we know. Within myself, it is so inconceivable that a man who would be this person would then turn around and be a hit man and run with the drug dealers. But you've made your decision and that's fine.

But even yet, the law says if you that he - - in other words, what are they saying? Is there something salvageable about this human being? And everybody who has spoken has said about William Weaver there's something salvageable. There is good in him. We're all created with the potential for good and bad. And whatever side you use your life for, that's the side you allow to overtake the potential - - okay? - - the potential that we all have, you, me, everybody. But William has used that side of his life to reach young people.

It said you may consider after his incarceration what he's done in the jail. He's helped them to read and write. If you send him away for life, there are inmates there in Jeff City who will be out in five years, ten years. But the William Weaver that you've heard about this week could reach some of them and send them back to society a little bit better than when they went in there. He'll be there for life if you send him there. But he can reach somebody in that penitentiary who may otherwise come out and say I'm going back into crime. A William Weaver can reach them.

How do you know that? Because even in County Jail this past year, they say, "William, will you talk to this group? They are getting out." And the men respect him. He's stopped fights. He's ask, "Man, don't do that. You're just going to get yourself in trouble." They said, "William, will you help us with this man? He's disabled." He's done it. They say, "William, will you teach in the class?" He's done it. So the law says - - not me - - the law says consider what is good about this person.

When you go back to that jury room - - and they talked about don't think about their tears. Well, even lawyers are human. We feel. You come to know people. And any person who has no feelings, oh, no, you'd better look at that person a little more closely. When you go back to that jury room, fight for life. And while I'm not saying chastise yourself or anything, realize and understand that it it's life, he can reach someone. If it's life and we were mistaken, it can be corrected. But if it's death, it is final. If it's death, those two young children have no father. If it's death, it won't bring Charles Taylor back. But you can salvage another human life.

Vote. Vote for life. Fight for it. Always fight for life, always. Always.

And he'll try to mention all about the hit man when he comes back and he didn't give Taylor a chance. And I'm not saying what happened to Taylor was right. But if you vote for life, you are still doing your duty. If you vote for life, you are sending a message. Because nobody loves being incarcerated and nobody would want to be locked up for life, never to see the sun or touch a tree if you want to. Nobody wants that. One - - I don't know which juror said it. One juror said it's almost a living death as I see it. And she's right. It is like a living death. And you're behind these bars so you're away from society and society is protected because you don't come back, you see. So you don't have that concern. You've sent your message. You've done your job.

Please, I beg you for William and for his family and his friends, Reverend Schroeder and those people who know that man, spare his life. Thank you.

THE COURT: Mr. Westfall, you have 14 minutes remaining.

FINAL SUMMATION ON BEHALF OF THE STATE

MR. WESTFALL: And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an

execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced your guilty, we're going to give you life in prison? That's not the right message.

Prison doesn't scare these people. Death would scare them. They surrendered at the moment of truth. When Shurn was told by Gardiner stop, he knew he was going to get blown away. Did he stop? Well, did you think he didn't think that he'd end up going to prison. He was caught moments after the murder. He knew he'd go to prison, but he stopped because he doesn't want to get killed. William Weaver doesn't want to die. Charles Taylor didn't want to die.

William Weaver when he saw Crain, he's too tired to run anymore. He's too tired, so he tried to talk his way out of it. Was he going to run? I mean when Crain said, "I'm going to have to take you in," did he bolt? No. He wants to live. The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community.

They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer yourself to that.

Yeah, there's a possibility your verdict could be wrong. Does that mean we shouldn't ever sentence anybody to die? That's the only logical result from that argument. That's what that means: Because there is a remote possibility we could be wrong, therefore, society never has the right to sentence anybody to die. All twelve of you said you agree with the death penalty, that you could impose it in the right case. Well, you're never a hundred percent sure of anything.

So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

MS. BLACK: Objection, Your Honor. That's improper argument to the jury. It's a misstatement of the law as well.

THE COURT: Sustained.

MS. BLACK: I ask the jury to be instructed to disregard the statement of counsel.

THE COURT: The jury will disregard the last comment of Mr. Westfall.

MR. WESTFALL: We can't bring Charles Taylor back to life, but we can save other lives. The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this. If some of those people really thought they faced the prospect of a death penalty, some of them wouldn't do it.

How do I prove to you with statistics how many lives were saved? I mean the old analogy is a lighthouse. I don't know how many shipwrecks a lighthouse prevents because we don't have statistics on those that don't occur. If it doesn't occur, it doesn't go down on paper. Yet, many shipwrecks are avoided because of a lighthouse. If a death penalty can save a life, we don't know because the murder won't occur. We don't have statistics of the innocent victims that might be saved instead of being killed at the hands of a convicted murderer.

William Weaver - - no tears all during the trial, but tears today. Naturally. He doesn't want to die. Same reason he surrendered to Officer Crain. He didn't want to get shot. He'd rather go to prison. You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.

I can't explain to you some of these good things he

does. I'll have to assume he does some of them. I suppose he's got one part of his life as a model citizen; but in the other part of his life, he's a hit man. When you want it done, they come to me. I'm good. I'm a hit man.

You've made you decision. Don't worry about it. You can't worry about the possibility that he's innocent. Because if you do that, then we wouldn't have a death penalty. Because that possibility always exists. And, yet, you twelve people said you could do it. In the right case, you said you could do it.

What remorse? The man still says he didn't do it. He's still lying to you. Rehabilitation? He isn't even sorry he did it. He's still lying to you.

MS. BLACK: Your Honor, he didn't do it and so, therefore, he has no reason to say he did.

THE COURT: If that's an objection - -

MS. BLACK: That's an objection as improper closing argument.

THE COURT: It is overruled.

MR. WESTFALL: He did do it. He did do it. He and Shurn went out there to kill Charles Taylor. They would have done it in his apartment where they would never have gotten caught, but things didn't work right. So they chase him across the field, gun him down like an animal. They are out of bullets. They are checking on him. Jean Henson told you that. Then they go back to the

car. He reloads. This man reloads. You know he did it. And he runs down and puts - - bam, bam - - three or four more shots right in his head, a dying man's head. They can't leave him alive because he knows Shurn. He may never have seen Weaver before, but he knows Shurn. So Weaver goes down and finishes him off, blows his brains out.

I don't doubt that Weaver didn't know Charles Taylor. Weaver doesn't have to know his victims. He's the hit man. And don't lose sight of the fact that he's the one that Shurn knows and the Shurns are big time criminals. And they chose William Weaver to do the job.

MS. BLACK: Your Honor, there is no evidence that the Shurns chose William Weaver. That is improper argument and it is not supported by any evidence in this case.

THE COURT: Overruled.

MR. WESTFALL: He was out there with Daryl Shurn killing a witness against Daryl Shurn's brothers. And you see other photographs of him with Larry Shurn. And you know they are friends. They are business associates. You're not fooled by that. So he's still lying to you. No remorse, not then, not now, not ever.

It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement office in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

MS. BLACK: Objection, Your Honor. This is personalizing this case and it's improper closing.

THE COURT: Sustained.

MS. BLACK: I ask the jury to be instructed to disregard it.

THE COURT: The jury will disregard the last comment of Mr. Westfall.

MR. WESTFALL: Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?

I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they going to go out in battle and they were scared young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do.

MS. BLACK: Objection, Your Honor. This is improper closing, to inflame and prejudice this jury by using that example in that particular movie.

MR. WESTFALL: Judge, it's just an analogy.

THE COURT: Overruled.

MR. WESTFALL: He said, "You'll know what to do." Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with you brain and you made the right decision. Today, you've got to reach down into your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we sentence you to die. You know what to do. Please have the courage to do it. Thank you.

Trial Transcript 1756-83.

Penalty Phase Jury Instructions in State of Missouri v. William L. Weaver, No. 565118 (St. Louis County Circuit Court)

INSTRUCTION NO. 20

The law applicable to this stage of the trial is stated in these instructions and instructions numbered 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

In these instructions, you are told that in order to consider the death penalty, you must find beyond a reasonable doubt certain propositions relating to aggravating circumstances. The burden of causing you to find these propositions beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The

law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 21

You found the defendant guilty of murder in the first degree. At this state of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for murder in the first degree is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 22

At this state of the trial, the law requires that certain circumstances be considered in making your decision as to the punishment to be imposed. We will proceed as follows:

First, the attorneys will have an opportunity to make a statement outlining any additional evidence to be presented. Such evidence may then be introduced.

After that, the Court will instruct you as to the circumstances you should consider in determining the punishment.

Then the attorneys may make their arguments.

You will then go to the jury room, deliberate and arrive at your verdict.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 23

In determining the punishment to be assessed against defendant for the murder of Charles Taylor, you must first unanimously determine whether on or more of the following aggravating circumstances exists:

1. Whether the defendant murdered Charles Taylor for the purpose of the defendant receiving money or any other thing of monetary value from Charles Taylor or another person.

2. Whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor.

3. Whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

4. Whether Charles Taylor was a potential witness in past or pending prosecutions of Charles Shurn, and/or Larry Shurn in Federal Court and was killed as a result of his status as a potential witness.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the

evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

A-306

INSTRUCTION NO. 24

If you find and believe from the evidence beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 23 exist, it will then become your duty to decide whether the aggravating circumstances are sufficient to warrant the imposition of death as punishment of defendant. In deciding that question, you may consider:

1. All of the evidence relating to the murder of Charles Taylor.

2. Any of the aggravating circumstances referred to in Instruction No. 23 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that those aggravating circumstances you have found warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION 25

If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 23, you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Charles Taylor.

You may consider:

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the defendant was an accomplice in the murder of Charles Taylor and whether his participation was relatively minor.

3. Whether the defendant acted as an accomplice and was not the trigger man.

4. The defendant has two young children and has a mother in failing health.

5. Whether the defendant has worked with young people in encouraging them to stay out of trouble and avoid drugs.

6. Whether the defendant, after his incarceration, has worked with inmates in teaching them reading and language skills, and assists inmates with disabilities.

7. Whether the defendant, since his incarceration, has been given responsibilities of trustee, indicating traits of character showing cooperation, helpfulness and a willingness to work within the confines of authority.

You may also consider any circumstances which you find from the evidence in mitigation of punishment.

If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

A-309

INSTRUCTION NO. 26

You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 27

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Charles Taylor, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 23 which you found beyond a reasonable doubt.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Charles Taylor by imprisonment for life by the Division of Corrections without eligibility for probation or parole, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Division of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of

the jury to fix the punishment.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 28

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law as given in these instructions.

It is your duty, and yours alone, to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then make his argument. The state's attorney may then reply. No further argument is permitted by either side.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	Cause No. 565118B
vs.	)	
WILLIAM WEAVER,	)	Div. No. 13
Defendant.	)	

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 27 for directions as to what must be written on this verdict form. The foreman's signature must appear after the aggravating circumstance or circumstances.)

We, the jury, having found the defendant William Weaver guilty of murder in the first degree of Charles Taylor, now assess and declare the punishment at death. We have found the following aggravating circumstance or circumstances beyond a reasonable doubt:

The aggravating circumstances are as follows:

#2 Whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor.

#3 Whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

#4 Whether Charles Taylor was a potential witness in past or pending prosecutions of Charles Shurn and/or Larry Shurn in Federal Court and was killed as a result of his statute as a potential witness.

\s\ Shirley Turner

(11)

No. 06-313

FILED
OCT 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
SUPREME COURT OF THE UNITED STATES

DONALD ROPER, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Petitioner,
vs.
WILLIAM WEAVER

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached Brief in Opposition To Petition for Writ of Certiorari to proceed *in forma pauperis*.

Respondent has previously been granted leave to proceed *in forma pauperis* in the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit.

No such affidavit is attached, inasmuch as the United States District Court appointed counsel for respondent under 18 U.S.C. § 3006(a)(2)(B) and 28 U.S.C. 848(q)(4)(B).

Dated: October 4th, 2006

Phillip Horwitz, #22662
3460 Hampton, Suite 205
St. Louis, Missouri 63139
(314) 621-1617
(314) 621-7448 - Facsimile
Attorney for Respondent

59

(11)

No. 06-313
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PHILIP HORWITZ
3460 Hampton, Suite 205
St. Louis, MO 63139
Phone: 314-481-6733
Fax: 314-481-6734
Attorney for Respondent

QUESTION PRESENTED FOR REVIEW

(CAPITAL CASE)

Whether the United States Supreme Court should review a claim that the lower courts erred in finding that the Missouri Supreme Court unreasonably applied this Court's precedent on penalty phase closing arguments when said determination rests solidly upon prior Supreme Court decisions and prior circuit case decisions interpreting those Supreme Court cases?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

OPINIONS BELOW AND JURISDICTION.....2

REASON THE WRIT SHOULD BE DENIED.....3

Petitioner alleges that the United States Court of Appeals for the Eighth Circuit erred in finding that the Missouri Supreme Court unreasonably applied this Court's precedent as well as prior circuit decisions interpreting United States Supreme Court cases that dealt with prejudicial and inflammatory penalty phase arguments. Petitioner contends that the Missouri Supreme Court decision was "not contrary to or an unreasonable application of Supreme Court precedent." In essence, the petitioner simply disagrees with the Eighth Circuit Court of Appeals panel majority decision. Furthermore, the petitioner reargues the same issues this Court previously refused to hear in *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001).

Petitioner's request for a petition for certiorari should be denied.....3

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476, U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69.....2

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed. 2d 231..... (1985).....8

Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001).....4,8,9

Darden v. Wainwright, 477 U.S.. 168, 106 S.Ct. 2464, 91 L.Ed.2 144 (1986).....9,10

Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).....9

Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.126 (1976).....7

Matteo v. Superintendent SCI Albion, 171 F.3d 877 (3rd Cir. 1999), *cert. denied*, 528 U.S. 824 (1999) 6

Musladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005), *cert. granted*, No. 05-785(April 17,. 2006).....6,7

Newlon v. Armontnout, 885 F2d. 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038..... (1999).....6,9.10

Paxton v. Ward, 199 F.3d 1197, (10th Cir. 1999), *cert. denied*, 513 U.S. 886 (1994).....9

Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994).....8

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d.600 (1996).....7

Shurn v. Delo, 177 F 3d. 662 (8th Cir. 1999), *cert. denied*, 528 U.S. 1010 (1999).....6,9,10

State v. Weaver, 912 S.W.2d 499 (Mo. 1995), *cert. denied*, 519 U.S. 856 (1996).....2

Weaver v. Bowersox, Case No. 4:96CV774CAS EDMO. 2

Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001) 2,3

United States v. Cronic, 466 U.S. 648 (1984),104 S.Ct.2039, 80 L.Ed.657 (1984).....5

Van Patten v. Deppsich, 434 F.3d 1038 (7th Cir. 2006), *cert. filed*, No.05-1527 (May 30,.. 2006).....5,6

Williams v. Taylor, 529 U.S. 362,120 S.Ct.1445,146 L.Ed.2d.389 (2000).....5,7

Williams v. Bowersox, 340 F.3d 667 (8th Cir. 2003).....6

Statutes and Authorities

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).....5

28 U.S.C. Section 2254 (2000).....6

Federal Habeas Corpus Practice and Procedure, 1439 4th Ed. (2001), Randy Hertz and James S. Liebman.....6

STATEMENT OF THE CASE

Mr. Weaver was charged in the Circuit Court of the County of St. Louis with the first degree murder of Charles Taylor. Mr. Weaver was charged with committing this murder with his co-defendant, Dale Shurn. Mr. Weaver was found guilty of the first degree murder of Charles Taylor and sentenced to die by lethal gas or lethal injection.

At trial, the state presented its theory that Mr. Weaver's involvement in the event was that he was acting as an agent for his co-defendant, Darryl Shurn, in shooting Charles Taylor. Prior to his death, Charles Taylor was cooperating with federal prosecutors relating to drug charges pending against Larry and Charles Shurn, relatives of Darryl Shurn. There was no direct link between Mr. Weaver and Charles Taylor ever established at trial.

The prosecution relied upon word on the street that Darryl Shurn planned to kill Charles Taylor because of his anticipated testimony, and the testimony of a St. Louis County jail inmate who testified that Mr. Weaver admitted to him while they were in custody that he, along with Darryl Shurn, had killed Charles Taylor. The St. Louis County jail inmate received a substantial reduction in his sentence for his testimony. This "deal" between the state prosecutor and the snitch, Dutch Tabler, was never

disclosed to Mr. Weaver's trial attorney.

In short, the state relied solely on circumstantial evidence in its presentation of its case against Mr. Weaver. During the guilt phase closing argument, the prosecutor asserted his personal beliefs, threatened the jury, and attacked the defense attorney's credibility. During the penalty phase closing argument, the prosecutor asked the jurors to kill the petitioner, emphasized his position of authority, asked the jury to send a message to all drug dealers and murderers everywhere, and compared the role of the jury to that of soldiers carrying out duties in wartime.

OPINIONS BELOW AND JURISDICTION

Mr. Weaver's conviction and sentence were upheld by the Missouri Supreme Court. *State v. Weaver*, 912 S.W.2d 499 (Mo. 1995). Mr. Weaver thereafter filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Missouri. Mr. Weaver's petition was subsequently granted by the Honorable Charles E. Shaw, United States District Judge. *Weaver v. Bowersox*, Case No. 4:96CV774CAS EDMO. (Pet. App. A-203).

The United States Court of Appeals for the Eighth Circuit reversed the district court's decision that a *Batson v. Kentucky* error had occurred, and remanded the petition for consideration of the remaining issues in the petition. *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001) (Pet. App. A-187). On remand, the district court again granted relief

as to the penalty phase arguments. The court held that the penalty phase arguments were wholly inflammatory, and the Missouri State Supreme Court decision was an unreasonable application of clearly established Supreme Court precedent and well established federal law.

The Eighth Circuit Court of Appeals upheld the decision of the district court, finding that the prosecutor's penalty phase arguments violated the United States Constitution. On May 31, 2006, the Court of Appeals denied petitioner's request for rehearing, and denied petitioner's request for hearing en banc.

The petition for writ of certiorari was placed on the Supreme Court docket on September 5, 2006. In accordance with Supreme Court Rule 15, Respondent filed his brief in opposition. This Court has jurisdiction under 28 U.S.C. §1254(1) 2000.

REASONS WRIT SHOULD BE DENIED

Petitioner alleges that the United States Court of Appeals for the Eighth Circuit erred in finding that the Missouri Supreme Court unreasonably applied this Court's precedent as well as prior circuit decisions interpreting United States Supreme Court cases that dealt with prejudicial and inflammatory penalty phase arguments. The petitioner simply contends that the Missouri Supreme Court decision was "not contrary to or an unreasonable application of Supreme Court precedent." In essence, the petitioner

simply disagrees with the Eighth Circuit Court of Appeals panel majority decision. Furthermore, the petitioner reargues the same issues this Court previously refused to hear in *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001).

Petitioner's application for the writ is based solely upon its disagreement with the determination of the Eighth Circuit Court of Appeals. This is an argument that has been advanced by petitioner, previously rejected by the circuit, and rejected by this Court. The panel opinion correctly concludes that the district court's grant of habeas relief should be upheld. The panel majority in so holding found that certain portions of the prosecutor's closing argument violated due process.

The panel majority also correctly noted that the Eighth Circuit has previously vacated death sentences in the two other cases tried by this prosecutor for similar reasons as those alleged by Weaver in his habeas petition. The panel majority went on to explain how the types of statements made in this case violated respondent's rights, and in its holding that the grant of Mr. Weaver's habeas petition was necessary:

> Category (1) was impermissible because it was "calculated to remove reason and responsibility from the sentencing process," and because describing jurors as soldiers with a duty avicerates the concept of discretion afforded to a jury as required by the Eighth Amendment, Categories (2), (4), and (5) were improper because statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury, because a prosecutor should not emphasize his or her position of authority making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment,

> and because arguments against a rational decision by the jury, and specifically those that implore the jury to kill the defendant immediately, are contrary to a fair proceeding; and Category (3) was impermissible because the argument that a signal must be sent from one case to effect other cases puts an improper burden on the defendant because it permits an individual determination of the appropriateness of capital punishment and because invoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly inflammatory. (Pet. App. A-13).

Under AEDPA, (Antiterrorism Effective Death Penalty Act of 1996), a court should grant relief if a decision is contrary to or involves an unreasonable application of clearly established federal law, or a decision is based on an unreasonable determination of the facts in light of the evidence presented. *Williams v. Taylor*, 529 U.S. 326 (2000). The petitioner reads this passage to demand that there shall be a United States Supreme Court decision clearly on all fours with a particular question, for any state court decision to be contrary to that decision. Were this the case, it would be impossible for the circuit to decide any issue. *Williams* at 337, n. 9.

In *Van Patten v. Deppsich*, 434 F.3d 1038 (7th Cir. 2006), the Seventh Circuit granted relief in a Wisconsin intentional homicide case finding that Defendant's right to counsel was violated when he went forward with a change of plea hearing while his attorney participated by telephone. This was a case of first impression for the Seventh Circuit, and because of the non-physical presence of the petitioner's attorney, the court concluded that the fact pattern gave rise to a violation of *United States v. Cronic*, 466

U.S. 648 (1984).

In *Van Patton*, the state argued that the state court's denial of relief was contrary to federal law because the Supreme Court had never decided a case involving counsel's participation in a plea hearing by telephone. The Seventh Circuit correctly turned aside the state's argument, explaining that the argument misapprehends the AEDPA regime. Factual context of cases may be regarded as materially indistinguishable because their legal implications are clearly the same, notwithstanding the facts themselves are significantly different. *Van Patten* at 1042; Note 2 (quoting Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure, 1439 n. 24 4th Ed. 2001). *See also, Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003); *Matteo v. Superintendent SCI Albion*, 171 F.3d 877 (3rd Cir. 1999), cert. denied, 528, U.S. 824 (1999).

Finally, the panel majority correctly reviewed two particularly significant cases: *Newlon v. Armontnout*, 885 F2d. 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1039 (1990) and *Shurn v. Delo*, 177 F 3d. 662 (8th Cir. 1999), cert. denied, 528 U.S. 1010 (1999). In both cases it was the same prosecutor as in the present case, and almost identical closing arguments were made. The sentences in both cases were vacated due to improper closing arguments. Clearly, *Newlon* and *Shurn* provide an important framework for analysis of the closing argument. The petitioner's contention that the Court of Appeals cannot rely on its own precedent, together with Supreme Court precedent, is without merit.

Petitioner contends that this Court's grant of certiorari in *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), would, in some fashion, be important to the determination of whether to grant the writ in the instant case. *Musladin* involved a situation where several family members of that individual killed by Musladin wore buttons on their shirts with the deceased's photograph on the buttons. The reviewing courts in *Musladin* found that the buttons were several inches in diameter and very noticeable. Furthermore, the family members were seated in a row directly behind the prosecution and in the clear view of the jury.

In arriving at its decision that Mr. Musladin's due process rights to a fair trial by an impartial jury free from outside influences had been violated, the *Musladin* court relied on clearly established federal law, specifically, this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), when an "unacceptable risk is presented of impermissible factors coming into play," there is an "inherent prejudice" to a defendant's constitutional right to a fair trial and reversal is required. The *Musladin* court felt that the issue of the buttons was factually similar with that of compelling a criminal defendant to wear prison garb and shackles before the jury, a practice that has been condemned by this Court. *Estelle v. Williams*, 425 U.S. 501 (1976). The issue in *Musladin* is not the prosecutorial misconduct that occurred in Mr. Weaver's case, it is factors external to the trial of a defendant that effect the defendant's ability to obtain a fair trial. Petitioner's request to

somehow claim that this Court's decision in the *Musladin* case could somehow effect the decision below in the instant case is in error.

In the present case, the petitioner's contention that habeas relief can be granted only when a state's decision is in conflict with Supreme Court precedent that matches as to law and fact is without support. *See Williams* at 377; Note 9. This argument has been previously advanced and refused to hear by this Court. *Copeland v. Washington*, 232 F.3d 969, 974 (8th Cir. 2000) cert. denied, 532, U.S. 1024(2001).

The petitioner further contends the panel majority incorrectly relied on the circuit's own precedent in determining whether habeas relief should be granted. This argument is without merit. This issue was previously reviewed in *Copeland* where the court stated, "to the extent that inferior federal courts have decided factually similar cases, references to those decisions are appropriate in assessing the reasonableness . . . of the state court's treatment of the contested issue. *Copeland* at 974.

It is important to note the circuit's decision in the *Copeland* case, wherein petitioner made exactly the same argument as petitioner raises today:

> The state next argues that because the Supreme Court has not discussed the impact of a prosecutor's improper closing argument during the penalty phase of a 974 capital case, AEDPA bars the petitioner's claim. Contrary to the state's assertion, it is apparent to us that there are Supreme Court decisions on penalty phase closing arguments, *See Caldwell v. Mississippi*, 472 U.S. 320, 340, n. 7, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985) (death sentence vacated because prosecutor's improper closing argument during penalty phase made it appear to jury that responsibility for the death penalty would be borne by appellate court rather than by jury itself); *Romano v.*

> *Oklahoma*, 512 U.S. 1, 3, 114 S.Ct. 2004, 129 L.Ed.2 (1994) (considering petitioner's assertion that closing argument in capital sentencing hearing violated petitioner's due process rights, although concluding on the facts that no rights were violated). There are also Supreme Court decisions on guilt phase closing arguments that are relevant. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (concluding that improper closing argument in guilt phase reaches level of constitutional error if prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *Darden v. Wainwright*, 477 U.S.. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2 144 (1986) (same). Further, in *Paxton v. Ward*, 199 F.3d 1197, 1717-18 (10th Cir. 1999), the Tenth Circuit considered a claim regarding an improper closing argument in the penalty phase of a capital case. While discussing the highly deferential standard of review under AEDPA at some length, the Tenth Circuit concluded that the closing argument constituted prosecutorial misconduct and warranted relief. Therefore, despite the state's claim that there is no precedent on penalty phase closing arguments, the Supreme Court cases demonstrate otherwise.

Copeland at 969.

Petitioner also argues the prosecutor's penalty phase closing argument on the merits was reasonable as determined by the Missouri Supreme Court. However, it is difficult to imagine a more inflammatory closing argument by a prosecutor.

As stated previously, the Court of Appeals examined five categories (Pet. App.A-13) of improper arguments and found each argument inflammatory. The categories covered a broad range of impermissible arguments. The prosecutor argued his personal beliefs, appealed to the juror's fears and emotions and threatened the jury to return a verdict of death. (Pet. App. A. 57-72). The jury in this case was subjected to a "relentless, focused, uncorrected argument... calculated to remove reason and

responsibility from the sentencing process." *Newlon*, 885 F.2nd at 1338.

Once again it is important to note that the prosecutor in the present case tried two previous capital punishment cases. In both cases the sentences were vacated due to improper arguments in the penalty phase. *Newlon v. Armontrout*, 884 F.2d 1328 (8th Cir. 1989); *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999). Almost identical arguments were made in the present case and therefore the conclusion by the Court of Appeals was appropriately the same. The prosecutor's argument was so inflammatory it "infected the trial with unfairness." *Darden v. Wainwright*, 477, U.S. 168, 181 (1986).

The Court of Appeals correctly affirmed the district court and held the Missouri Supreme Court decision was unreasonable under existing United States Supreme Court precedent.

CONCLUSION

The petition for writ of certiorari should be denied.

Philip M. Horwitz
Attorney of Record
3460 Hampton Avenue, Suite 205
St. Louis, Missouri 63139
(314) 481-6733
(314) 481-6734 – Facsimile
Attorney for Respondent

(4)

No. 06-313

IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

WILLIAM WEAVER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

BARRY LATZER
John Jay College of Criminal Justice, CUNY
445 W. 59th Street
New York, NY 10019
(212) 237-8192

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

(Intentionally left blank)

QUESTIONS PRESENTED

Did the Eighth Circuit Court of Appeals exceed its authority under AEDPA when it affirmed the issuance of a writ of habeas corpus for prosecutorial misconduct issues that have never been the subject of a holding by the Supreme Court of the United States?

(Intentionally left blank)

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

The Supreme Court of Missouri was entitled to deference under AEDPA when it decided summarily, but on the merits, that remarks by the prosecutor during the sentencing phase of a capital trial were permissible 7

II

The Eighth Circuit Court of Appeals exceeded its authority under AEDPA when it affirmed the issuance of a writ of habeas corpus for prosecutorial argument issues that are neither materially indistinguishable from a Supreme Court precedent, governed by a specific rule in Supreme Court precedent, nor an obvious and egregious violation of general principle 14

Conclusion 27

Appendix

TABLE OF AUTHORITIES

Cases

Brooks v. Kemp, 762 F. 2d 1383 (CA11 1985) 23, 26

Brown v. Luebbers, 371 F. 3d 458 (CA8 2004) 10

Caldwell v. Mississippi, 472 U. S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) 17

Canaan v. McBride, 395 F. 3d 376 (CA7 2005) 10

Carey v. Musladin, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) 4, 5, 7, 14, 15, 16, 23

Clark v. Commonwealth, 833 S. W. 2d 793 (Ky. 1991) 26

Clemons v. Mississippi, 494 U. S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) 11

Collins v. Francis, 728 F. 2d 1322 (CA11 1984) 25

Copeland v. Washington, 232 F. 3d 969 (CA8 2000) 17

Darden v. Wainwright, 477 U. S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) 17, 18, 19

Donnelly v. DeChristoforo, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) 17, 19, 20, 21, 25

Edwards v. State, 737 So. 2d 275 (Miss. 1999) 25

Estelle v. Williams, 425 U. S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) 15

Fortini v. Murphy, 257 F. 3d 39 (CA1 2001) 10

Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) 20

Hogan v. Gibson, 197 F. 3d 1297 (CA10 1999) 10

Holbrook v. Flynn, 475 U. S. 560, 106 S. Ct. 1340,
89 L. Ed. 2d 525 (1986) 15, 16

Hope v. Pelzer, 536 U. S. 720, 122 S. Ct. 2508,
153 L. Ed. 2d 666 (2002) 14

James v. Bowersox, 187 F. 3d 866 (CA8 1999) 10

Lockyer v. Andrade, 538 U. S. 63, 123 S. Ct. 1166,
155 L. Ed. 2d 144 (2003) 14, 15

Mancuso v. Herbert, 166 F. 3d 97 (CA2 1999) 9

Muth v. Frank, 412 F. 3d 808 (CA7 2005) 10

Newlon v. Armontrout, 885 F. 2d 1328
(CA8 1989) 25, 26

Romano v. Oklahoma, 512 U. S. 1, 114 S. Ct. 2004,
129 L. Ed. 2d 1 (1994) 17, 19, 21, 22

Roper v. Weaver, 127 S. Ct. 763, 166 L. Ed. 2d 590
(2006) 4

Ryan v. Miller, 303 F. 3d 231 (CA2 2002) 13

Sawyer v. Smith, 497 U. S. 227, 110 S. Ct. 2822,
111 L. Ed. 2d 193 (1990) 21

Shurn v. Delo, 177 F. 3d 662 (CA8 1999) 27

Slack v. McDaniel, 529 U. S. 473, 120 S. Ct. 1595,
146 L. Ed. 2d 542 (2000) 9

State v. Armbruster, 641 S. W. 2d 763 (Mo. 1982) 11

State v. Irick, 762 S. W. 2d 121 (Tenn. 1988) 25

State v. Knighton, 436 So. 2d 1141 (La. 1983) 26

State v. Rose, 548 A. 2d 1058 (N.J. 1988) 25

State v. Tyler, 50 Ohio St. 3d 24, 553 N. E. 2d 576 (1990) 24

State v. Weaver, 912 S. W. 2d 499 (Mo. 1995) 2, 3, 8, 11, 12, 13

Van Tran v. Lindsey, 212 F. 3d 1143 (CA9 2000) 9

Weaver v. Bowersox, 241 F. 3d 1024 (CA8 2001) 4, 9

Weaver v. Bowersox, 438 F. 3d 832 (CA8 2006) ... Passim

Weaver v. Bowersox, No. 4:96-CV-2220-CAS (ED Mo., Aug. 9, 1999) 3

Weaver v. Bowersox, No. 4:96-CV-2220-CAS (ED Mo., May 7, 2003) 4, 8

Weaver v. Missouri, 519 U. S. 856, 117 S. Ct. 153, 136 L. Ed. 2d 98 (1996) 3

Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 6, 7, 14, 16

Witter v. State, 112 Nev. 908, 921 P. 2d 886 (1996) 25

Woodford v. Garceau, 538 U. S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003) 9

Woodson v. North Carolina, 428 U. S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) 18

Yarborough v. Alvarado, 541 U. S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) 15

United States Statute

28 U. S. C. § 2254(d)(1) 4, 5, 9

Secondary Authorities

Committee Report and Proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, reprinted in 135 Cong. Rec. 24,694 (1989) 6

IN THE

Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

WILLIAM WEAVER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case exemplifies an unfortunate tendency of federal courts to skirt the restrictions imposed on them by Congress in the Antiterrorism and Effective Death Penalty Act of 1996

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

(AEDPA). In the interest of comity, respect for state court processes, especially the processes that affect the administration of justice, and finality in capital cases, Congress restricted the authority of federal courts to issue the writ of habeas corpus to those state court decisions that are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

In the face of this limitation, federal courts are not free to issue the writ to correct every perceived state court error in the interpretation of federal law. Rather, they may only issue the writ in the face of decisions that are patently incompatible with United States Supreme Court case law. It is revealing that the Eighth Circuit Court of Appeals, in this very case, redacted from its recitation of the text of 28 U. S. C. § 2254(d)(1) the words "as determined by the Supreme Court of the United States."

This case presents another opportunity for this Court to give effect to Congress's limitation on the lower federal courts. It is apparent that the temptation to overstep AEDPA's boundaries simply is too great. This Court must, therefore, once again reaffirm the necessity of deference to the state judiciary. This deference is essential to the efficient and reliable determination of guilt and the swift execution of punishment that serves as the principal goal of the CJLF.

SUMMARY OF FACTS AND CASE

Before July 1987, a federal drug prosecution began against Daryl Shurn's brothers, Charles and Larry Shurn, in which Charles Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name. *State* v. *Weaver*, 912 S. W. 2d 499, 507 (Mo. 1995).

On July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home to force Taylor to sign over the Shurns' drug properties. After Taylor had signed the paperwork, Weaver

was supposed to kill Taylor. However, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. They followed him to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to their automobile, then Weaver returned to the wooded area and shot Taylor again. Taylor died from several gunshot wounds to the head. *Ibid.*

> "Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to the police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward [an] apartment complex adjacent to the highway." *Id.*, at 507-508.

A police officer found Weaver, who was sweating profusely, running shoeless on a concrete street. Weaver claimed he was jogging, although he was many miles from home. He also said he was lost. He was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified him. *Id.*, at 508.

At trial, the jury found Weaver guilty of first-degree murder and recommended a sentence of death. Weaver filed a motion for postconviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the court denied the motion. Weaver pursued a consolidated appeal to the Supreme Court of Missouri. *Id.*, at 507. That court affirmed his conviction and sentence and affirmed the denial of postconviction relief. *Ibid.* This Court denied certiorari. *Weaver* v. *Missouri*, 519 U. S. 856 (1996).

Weaver then sought federal habeas corpus relief under 28 U. S. C. § 2254. The United States District Court for the Eastern District of Missouri granted the petition and set aside the conviction and sentence. *Weaver* v. *Bowersox*, No. 4:96-

CV-2220-CAS (ED Mo., Aug. 9, 1999). The United States Court of Appeals for the Eighth Circuit reversed. *Weaver* v. *Bowersox*, 241 F. 3d 1024 (CA8 2001). On remand, the district court granted relief as to the penalty phase only on the ground that Weaver's due process rights were violated by the prosecutor's penalty phase closing argument. *Weaver* v. *Bowersox*, No. 4:96-CV-2220-CAS (ED Mo., May 7, 2003). The Court of Appeals affirmed the district court's judgment in a 2-1 decision. *Weaver* v. *Bowersox*, 438 F. 3d 832 (CA8 2006). On May 31, 2006, the Court of Appeals denied a petition for rehearing. That court also denied, in a 5-5 decision, a petition for rehearing en banc. This Court granted the state's petition for writ of certiorari on December 7, 2006, *Roper* v. *Weaver*, 127 S. Ct. 763, 166 L. Ed. 2d 590 (2006), and denied the defendant's cross-petition on December 11. *Weaver* v. *Roper*, No. 06-7089.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit affirmed the issuance of a writ of habeas corpus in a case in which that court conceded that AEDPA's limitations apply—and then promptly ignored them. As we argue—and the Eighth Circuit acknowledged—although the Missouri Supreme Court addressed Weaver's claims "in a conclusory fashion," that review was "sufficient to bring the case under AEDPA." *Weaver* v. *Bowersox*, 438 F. 3d 832, 838 (CA8 2006).

Once AEDPA applies, as that selfsame statute makes clear, the writ of habeas corpus may *not* issue unless that state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1).

As this Court recently held in *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), the words "as determined by the Supreme Court of the United States" refer to

United States Supreme Court *holdings* on the relevant issue. *Id.*, 127 S. Ct., at 653, 166 L. Ed. 2d, at 487. The Eighth Circuit did not comply with this requirement, relying instead on one of its own decisions. That decision in turn referenced four rulings of this Court, which, though concerned with allegedly improper conduct by prosecutors, nevertheless do not provide clearly established law applicable to *Weaver*. A close examination of these four cases reveals that they are not similar enough or specific enough to qualify as controlling, clearly established federal law. This conclusion is given additional support by an examination of analogous lower federal and state court decisions. That case law strongly suggests that there is no clear guidance from this Court on these particular issues.

Since the state court ruling was not incompatible with clearly established federal law, as determined by this Court, the Court of Appeals exceeded its authority under AEDPA when it approved the issuance of the writ of habeas corpus.

ARGUMENT

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That Act placed new restrictions on the authority of federal courts to grant writs of habeas corpus to state prisoners. The relevant provision, 28 U. S. C. § 2254(d)(1), prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

By its terms, AEDPA limits the issuance of federal habeas writs to a subset of contested state court interpretations of federal law. Erroneous interpretations that are not contrary to Supreme Court rulings, and are not unreasonable applications thereof, are beyond the reach of federal habeas courts. It is clear that Congress sought a compromise between the need for

uniformity of federal law and the desire for respect for state court decisions involving the administration of criminal justice, a field in which state courts play the predominant role. If this compromise is to be maintained, and the will of Congress realized, it is imperative that AEDPA's strictures on federal habeas courts be given full and generous effect.

Death penalty cases provide an additional reason for preserving and perpetuating the AEDPA compromise—the interest in finality. Congress was well aware, as the title of the Act indicates, that capital cases were being delayed to the point that public confidence in the criminal justice system was jeopardized. Repeated and protracted habeas corpus litigation contributed significantly to this problem. Before AEDPA was approved, an influential committee headed by the late Supreme Court Justice Lewis F. Powell, Jr., declared:

> "[O]ur present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The resulting lack of finality undermines public confidence in our criminal justice system."[2]

By limiting habeas petitions to only the most clear-cut misapplications of federal law—those that are contrary to, or involve an unreasonable application of, clearly established federal law—Congress unambiguously evinced its intention to restrict the issuance of these petitions. As this Court has recognized, " 'Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law.' " *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000), quoting *id.*, at 386 (opinion of Stevens, J.).

---

2. Committee Report and Proposal from the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, reprinted at 135 Cong. Rec. 24,694 (1989).

Earlier this term, in *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), this Court recognized that the § 2254(d)(1) restrictions permit the granting of a writ only when the state court has misapplied United States Supreme Court *holdings* on the relevant issue, as opposed to dicta. See also *Williams*, 529 U. S., at 412. *Musladin* thereby acknowledged the need to establish a liberal interpretation of § 2254(d)(1)'s restrictions, and the concomitantly narrow ~~authority~~ of the habeas-issuing courts.

The instant case provides another opportunity for this Court to reaffirm that lower federal courts may not rely exclusively on their own cases to justify federal habeas petitions subject to § 2254(d)(1) limitations, but instead, must find that the state court ruling is incompatible with relevant United States Supreme Court holdings. This means only (1) a contrary decision on materially indistinguishable facts; (2) applying a standard contrary to a specific rule; or (3) a violation of a general principle which is so flagrant that it is obviously a violation. As we will demonstrate, Weaver's case is factually distinct from this Court's cases, none of which covers this situation, and the deference due state court decisions should have applied. As Eighth Circuit Judge Bowman said in dissent on this issue: "None of the Supreme Court cases cited in the Court's opinion touches on the distinct claims of prosecutorial misconduct on which the writ was granted." *Weaver* v. *Bowersox*, 438 F. 3d 832, 844 (CA8 2006) (Bowman, J., concurring in part and dissenting in part).

I. The Supreme Court of Missouri was entitled to deference under AEDPA when it decided summarily, but on the merits, that remarks by the prosecutor during the sentencing phase of a capital trial were permissible.

William Weaver was found guilty and sentenced to death for the murder of Charles Taylor, a killing stemming from a dispute among drug dealers and Taylor's expected testimony in

a federal drug prosecution. The conviction and sentence were affirmed by the Supreme Court of Missouri. See *State* v. *Weaver*, 912 S. W. 2d 499 (Mo. 1995). In the course of its 24-page opinion, the state supreme court decided, *inter alia*, that the state's closing arguments during the penalty phase of Weaver's capital trial were supported by the evidence and that the trial court did not abuse its discretion in permitting them. It also held that the prosecutor's arguments did not render the penalty phase of the trial fundamentally unfair. *Id.*, at 513-514. Subsequently, the United States District Court for the Eastern District of Missouri granted habeas relief on the grounds that three different penalty phase remarks of the prosecutor violated Weaver's Fourteenth Amendment Due Process rights. *Weaver* v. *Bowersox*, No. 4:96-CV-2220-CAS (ED Mo., May 7, 2003). The text of those arguments are set out in the Appendix.

The first of the prosecutor's comments, the "Innocence Remark," identified in the Eighth Circuit opinion as Claim 2E, concerned the prosecutor's concession that there is a possibility that defendant was innocent, followed by his implication that such a possibility is insufficient to serve as a legal bar to a death sentence. The second comment, the "Soldier Analogy," identified as 2F, compared the jurors to soldiers in wartime, suggesting that both were, at times, under a duty to kill. The third statement, 2M, the "Deterrence Statement," focused on the need to protect the community by deterring murderers like Weaver through the imposition of the death penalty.

A divided three-judge panel of the Eighth Circuit Court of Appeals affirmed the issuance of the writ, holding that while § 2254(d)(1) of AEDPA applied to the federal courts in Weaver's case, it did not bar relief because "there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents." *Weaver* v. *Bowersox*, 438 F. 3d 832, 842 (CA8 2006).

We consider first whether AEDPA is applicable to this case. There are two issues: whether or not a pre-AEDPA filing

by Weaver affects the application of the statute, and whether or not the state court sufficiently considered the claims for them to be treated as "adjudicated on the merits" as that phrase is used in § 2254(d).

The filing issue presents no serious obstacle to the applicability of AEDPA. Weaver filed his petition for the writ of habeas corpus on November 12, 1996, which was after April 24, 1996, AEDPA's effective date. Although Weaver also had filed a pre-AEDPA habeas petition, that petition had been dismissed without prejudice for failure to exhaust state remedies. *Weaver* v. *Bowersox*, 241 F. 3d 1024, 1029 (CA8 2001). This Court has held that pre-AEDPA filings by an applicant do not preclude application of the statute. "[A]n application filed after AEDPA's effective date should be reviewed under AEDPA, even if other filings by that same applicant—such as, for example, a request for the appointment of counsel or a motion for a stay of execution—were presented to a federal court prior to AEDPA's effective date." *Woodford* v. *Garceau*, 538 U. S. 202, 207 (2003). AEDPA applies to an appeal filed after its effective date, even if the petition was filed in the district court before that date. See *Slack* v. *McDaniel*, 529 U. S. 473, 480-482 (2000). AEDPA is applicable to a petitioner's filing after the statute's effective date even if he also filed prior to that date, where the earlier petition was dismissed for failure to exhaust state remedies. See *Weaver* v. *Bowersox*, 241 F. 3d 1024 (CA8 2001); *Van Tran* v. *Lindsey*, 212 F. 3d 1143 (CA9 2000), overruled on other grounds, *Lockyer* v. *Andrade*, 538 U. S. 63, 71, 75 (2003); *Mancuso* v. *Herbert*, 166 F. 3d 97 (CA2 1999). Any other rule would invite an applicant to evade AEDPA simply by filing prematurely.

The adjudication-on-the-merits issue is a bit less straightforward. Section 2254(d) says: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was *adjudicated on the merits* in State court proceedings . . . ." (Emphasis added). Therefore, if a claim

was not "adjudicated on the merits" § 2254(d) is inapplicable. See *Canaan* v. *McBride*, 395 F. 3d 376, 382 (CA7 2005); *Fortini* v. *Murphy*, 257 F. 3d 39, 47 (CA1 2001); *Hogan* v. *Gibson*, 197 F. 3d 1297, 1306 (CA10 1999).

The Eighth Circuit correctly held that although the Missouri Supreme Court addressed Weaver's claims "in a conclusory fashion," that review was "sufficient to bring the case under AEDPA." *Weaver*, 438 F. 3d, at 838. The court cited *Brown* v. *Luebbers*, 371 F. 3d 458, 462 (CA8 2004) ("the 'summary nature' of the discussion of the federal constitutional question does not preclude application of the AEDPA standard"), *James* v. *Bowersox*, 187 F. 3d 866, 869 (CA8 1999) (the summary nature of a state court opinion does not affect the federal court's decision to apply the AEDPA standard), and *Muth* v. *Frank*, 412 F. 3d 808, 815 (CA7 2005) ("AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state court is not an entitlement to a well-articulated or even a correct decision by a state court. In fact, several circuits have held that a state court need not offer *any* reasons and summarily dispose of a petitioner's claim and that summary disposition would be an adjudication on the merits").

However, Circuit Judge Bye, concurring in the result, concluded that AEDPA is inapplicable because "the state court discusses and analyzes only three of the six" claims raised by Weaver and "ignored Weaver's most compelling constitutional claim." *Weaver*, 438 F. 3d, at 843 (Bye, J., concurring in the result).

The Supreme Court of Missouri addressed the relevant issues as follows. First, at the beginning of Part IV of the opinion, the court presented an overview of the defendant's prosecutorial misconduct claims.

> "Defendant argues that the state's closing arguments during both the guilt and penalty phases of the trial were erroneous and further that counsel was ineffective in failing to object to some of the improper arguments. A review of

> the record discloses that defense counsel objected vehemently to almost all the arguments complained of here and that several of the objections were sustained, followed by curative instructions to the jury. The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted. *State* v. *Armbruster*, 641 S. W. 2d 763, 766 (Mo. 1982). Our review of the arguments discloses neither error in permitting the arguments nor ineffective assistance of counsel in failing to object." *Weaver*, 912 S. W. 2d, at 512.

The above-quoted statement of the state supreme court is, in and of itself, sufficient to constitute an adjudication on the merits of Weaver's prosecutorial misconduct claims. First, the court made clear that it was ruling on *all* of the prosecutorial argument claims. In a reference to the totality of defendant's claims, the court noted that defense counsel "objected vehemently to almost all the arguments complained of here." *Ibid.* In addition, the court's statement that it made a "review of the arguments" clearly referred to *all* of defendant's claims respecting allegedly improper statements by the prosecutor. *Ibid.* Contrary to Judge Bye's assertion, there is no requirement that the state court discuss and analyze each subclaim individually. Cf. *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990) (an appellate court may implicitly reject litigants' arguments by refusing to address them). A state court may collectively address the multiple components of a single legal claim, and, as long as it reaches the merits of the issue, each component should be considered adjudicated on the merits for the purposes of § 2254(d). Consequently, the state court's discussion of "the state's closing arguments during both the guilt and penalty phases of the trial," *Weaver*, 912 S. W. 2d, at 512, was sufficient to serve as adjudication on the merits of each prosecutorial misconduct claim.

Second, after reviewing in detail what it probably considered the most meritorious of defendant's prosecutorial misstate-

ment claims (Parts IV-A and IV-B of the opinion), the Missouri Supreme Court presented in Part IV-C of the opinion a separate analysis of the prosecutor's statements at the sentencing hearing.

> "Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied." *Weaver*, 912 S. W. 2d, at 514.

It is abundantly clear that the court was referring to all of these claims collectively, as it speaks of "a collection of allegedly improper arguments made by the state during the punishment phase," followed by its finding that "these arguments are reasonable." *Ibid.* Clearly, the court felt that each individual argument was reasonable. Therefore, each claim should be considered adjudicated on the merits.

Furthermore, it is not apparent that the state court actually failed to single out for review the subclaim that Judge Bye appears to have thought most compelling. Judge Bye identified prosecutor's statement 2M as the "War on Drugs" claim, and asserted that the Missouri court "ignored" it. *Weaver*, 438 F. 3d, at 843 (Bye, J., concurring in the result). However, that prosecutorial statement might just as convincingly be identified

as the "Deterrence Statement" because it refers four different times to the need for a death sentence in order to achieve general deterrence.[3] The Missouri Supreme Court explicitly approved of the deterrence argument: "Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable." *Weaver*, 912 S. W. 2d, at 514. It is plausible to consider this a reference to Claim 2M. Therefore, one cannot say with certainty that the Missouri Supreme Court "ignored" defendant's argument.

Ultimately, however, whether the state court explicitly resolved the 2M claim or decided it as part of a bloc of similar claims is of no moment insofar as AEDPA is concerned. If a state court, as the Missouri Supreme Court did, adjudicates a claim on the merits, then § 2254(d) is applicable. State courts are entitled to deference simply because they adjudicated the relevant claim on the merits, whether or not they "discussed or analyzed" the issue. There is neither a qualitative nor a quantitative test for state court opinions. See *Ryan* v. *Miller*, 303 F. 3d 231 (CA2 2002) (state court's failure to specifically address habeas applicant's Confrontation Clause challenge does not obviate deferential review where the court made a blanket statement that defendant's remaining contentions were either unpreserved for appellate review or without merit). "A state court need not analyze each individual claim or cite federal law in order to adjudicate a claim, so long as it states it is disposing of the claim on the merits, and it issues a judgment." *Id.*, at 246. The Eighth Circuit majority was right, and Judge Bye was in error.

---

3. Four statements of the prosecutor either expressly or impliedly refer to general deterrence, the theory that punishing offenders discourages crime by others. These remarks are identified as Claim 2M. See *Weaver*, 438 F. 3d, at 836-837. See Appendix, the paragraph on App. 1-App. 2, the paragraph on App. 2-App. 3, and the first and second full paragraphs on App. 3.

In sum, where a state court decides on the merits a bloc of similar claims—here, numerous allegedly improper prosecutorial arguments—without separately discussing each subclaim, it may be said to adjudicate each subclaim on the merits for § 2254(d) purposes.

II. The Eighth Circuit Court of Appeals exceeded its authority under AEDPA when it affirmed the issuance of a writ of habeas corpus for prosecutorial argument issues that are neither materially indistinguishable from a Supreme Court precedent, governed by a specific rule in Supreme Court precedent, nor an obvious and egregious violation of general principle.

In *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), this Court reiterated that the phrase "clearly established Federal law" in § 2254(d)(1), the Antiterrorism and Effective Death Penalty Act of 1996, " 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' " *Id.*, 127 S. Ct., at 653, 166 L. Ed. 2d, at 487, quoting *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). Therefore, federal habeas relief was properly granted in Weaver's case only if the Missouri Supreme Court's decision was contrary to or involved an unreasonable application of this Court's applicable holdings.

Where the clearly established law is only a broad principle, it would take an extreme case for a state court decision to be an unreasonable application. In *Lockyer* v. *Andrade*, 538 U. S. 63, 72-73 (2003), the only clearly established law was that sentences cannot be grossly disproportionate. Given the vagueness and generality of this principle, it would provide a governing standard only in " 'exceedingly rare' and 'extreme' case[s]." *Id.*, at 73. None of this Court's modern habeas cases provide a real-life example of conduct so outrageous that it constitutes a clear violation of a general principle. In the related qualified immunity area, *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002)

notes that tying a prisoner to a hitching post all day, shirtless, in the Alabama sun is *arguably* such a violation. See also Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Musladin*, No. 05-785, pp. 7-8. Whatever one thinks of the prosecutor argument in the present case, it does not come remotely close to the kind of extreme misconduct that would violate clearly established law without a specific rule or precedent governing the situation.

The key question, then, is how specific or how factually similar must a ruling of this Court be to serve as an applicable holding? See *Lockyer*, 538 U. S., at 76; *Yarborough* v. *Alvarado*, 541 U. S. 652, 664-666 (2004). In *Musladin*, this Court found that none of its prior holdings required the state court to apply to the context in *Musladin* the legal test developed in a different context. Consequently, the state court's decision was held not contrary to or an unreasonable application of clearly established federal law.

Musladin involved a display of the victim's image on buttons worn by the murder victim's family during Musladin's trial. The state court held that this conduct did not deny the right to a fair trial. The Court of Appeals for the Ninth Circuit reversed the United States District Court and remanded for issuance of the writ of habeas corpus. See 127 S. Ct., at 651-652, 166 L. Ed. 2d, at 486-487. According to the Court of Appeals, this Court's decisions in *Estelle* v. *Williams*, 425 U. S. 501 (1976), and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986), clearly established a rule of federal law—the test for inherent prejudice—applicable to Musladin's case.

In *Estelle*, this Court stated that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," but held that defendant waived his rights by failing to object at trial. 425 U. S., at 512. In *Flynn*, this Court held that the presence of four uniformed state troopers immediately behind the defendant at trial was not so inherently prejudicial that it denied the defendant a fair trial. The *Flynn* Court

announced that the test is "whether an unacceptable risk is presented of impermissible factors coming into play." 475 U. S., at 570 (internal quotation marks deleted).

Since both *Estelle* and *Flynn* concerned displays during a criminal trial that arguably prejudiced the defendant, it was plausible to conclude, as the Ninth Circuit did, that the buttons displayed in *Musladin* implicated the *Flynn* test. Nonetheless, this Court distinguished *Estelle* and *Flynn* and held that no holding of this Court required application of their rules to the *Musladin* case. As this Court explained, *Estelle* and *Flynn* involved state-sponsored courtroom practices, not spectator conduct, and "the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence." 127 S. Ct., at 653, 266 L. Ed. 2d, at 488. Crucially, Justice Thomas, writing for this Court, added that "although the Court articulated the test for inherent prejudice that applies to state conduct in *Williams* and *Flynn*, we have never applied that test to spectators' conduct." *Id.*, 127 S. Ct., at 653-654, 166 L. Ed. 2d, at 488.

Thus, the message of *Musladin* is that where this Court has applied a legal test for a particular situation, then that Supreme Court decision should not be considered "clearly established Federal law" with respect to a different situation where a different standard may arguably be appropriate. In addition, where the facts of the habeas petitioner's case are "materially indistinguishable from a decision of this Court," *Williams*, 529 U. S., at 406, that Supreme Court precedent will constitute clearly established federal law for AEDPA's purposes. For the same reasons discussed below, the facts in Weaver's case are materially distinguishable from the relevant United States Supreme Court precedents.

In its *Weaver* ruling, the Eighth Circuit Court of Appeals—like the Ninth Circuit in *Musladin*—relied on its own case law to establish the existence of "clearly established Federal law." *Weaver*, 438 F. 3d, at 839, citing *Copeland* v. *Washington*, 232 F. 3d 969, 974 (CA8 2000). The relied-on

Eighth Circuit case, *Copeland* v. *Washington*, 232 F. 3d 969 (CA8 2000), in turn held that certain United States Supreme Court decisions on penalty phase as well as guilt phase closing arguments were sufficient to satisfy AEDPA's "clearly established Federal law" requirement. *Id.*, at 973-974. The decisions cited were *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), and *Romano* v. *Oklahoma*, 512 U. S. 1 (1994), for penalty phase issues, and *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), and *Darden* v. *Wainwright*, 477 U. S. 168 (1986), for guilt phase claims. It is true that all of these cases, like *Weaver*, concern allegedly improper conduct by prosecutors—but that is where the similarity ends.

Donnelly and *Darden* do not provide clearly established law applicable to *Weaver* because, unlike *Weaver*, they do not concern the sentencing stage of a death penalty case. Undoubtedly, the law and the issues arising out of the penalty phase of a capital case are significantly different from those associated with the guilt-determination phase. See *Caldwell*, 472 U. S., at 329 (applying the Eighth Amendment to prosecutorial remarks in the sentencing phase of a capital case because " 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination' "), quoting *California* v. *Ramos*, 463 U. S. 992, 998-999 (1983). The Eighth Circuit, in *Copeland*, acknowledged this difference, 232 F. 3d, at 974, n. 2, but suggested that the greater scrutiny required in the sentencing phase case provided additional support for issuance of the writ of habeas corpus. To the contrary, however, where AEDPA applies, the issuance of the writ turns not on the need for, in the Court of Appeals' words, "a more searching review," *ibid.*, but rather on the existence of clearly applicable United States Supreme Court precedent.

Darden does not provide that precedent. The relevant issue in *Darden*, as this Court put it, was whether "the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the

sentencing determination of the reliability that the Eighth Amendment requires." 477 U. S., at 178-179. The challenged remarks, as described by this Court, were found: (1) The prosecutor "place[d] some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred." *Id.*, at 179-180. (2) "Some comments implied that the death penalty would be the only guarantee against a future similar act." *Id.*, at 180. (3) Other comments "incorporated the defense's use of the word 'animal.' " *Ibid.* (4) "Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case." *Ibid.*

First of all, none of these prosecutorial remarks is similar to the challenged comments in *Weaver*, *i.e.*, to the "Innocence Remark," the "Soldier Analogy," or the "Deterrence Statement." Consequently, the *Darden* holding would have afforded little guidance to the state court. Of course, the remarks need not be virtually identical for the Supreme Court precedent to provide clearly established law, but where they are so completely different that it will be difficult for a state court to be confident that its ruling is consistent with this Court's case law, AEDPA mandates deference to the state court's ruling.

Second, the primary question in *Darden*—whether the remarks "rendered his conviction fundamentally unfair," 477 U. S., at 178—is a very different question from that raised by *Weaver*, viz., whether the *sentence* was invalid. This is a crucial distinction. The factors that enter into the death sentencing decision are very different from those that affect the guilt or innocence determination. For instance, the jury's judgment about the "character and record of the individual offender," *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), is relevant to sentence, but not usually to guilt. Moreover, the focus of the closing remarks at the sentencing, as opposed to the guilt phase, is apt to reflect this difference. Consequently, that which renders a *conviction* fundamentally unfair may not affect a *death sentence*, and vice versa.

Third, the other *Darden* issue—whether the prosecutor's remarks violated the *Caldwell* principle by depriving the sentencing determination of the reliability that the Eighth Amendment requires—implicates a distinctive legal theory, one involving the affirmative misleading of the jury regarding its role in the sentencing process. See *Romano*, 512 U. S., at 9 (holding that admission of evidence that a capital defendant already had been sentenced to death in another case did not violate the *Caldwell* principle). The *Darden* Court held that there was no *Caldwell* violation since "the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing." 477 U. S., at 183, n. 15. Thus, with respect to the *Caldwell* issue, both the facts and the legal theory of *Darden* differentiate it from *Weaver*. The *Caldwell* portion of the *Darden* decision is of no relevance to Weaver's due process claim respecting the prosecutor's penalty phase remarks.

In addition to its distinguishable facts and distinct context, *Darden* did not establish any specific rule relevant to this case because *Darden* held that there was no violation of due process in that case. The only standard stated is the very general *Donnelly* rule, see 477 U. S., at 181. A case holding that a certain set of facts does *not* violate a very general standard does little toward establishing a rule that other facts not before the Court would violate that standard.

In short, this Court's holding in *Darden* is materially distinguishable from Weaver's case, arose in a different context, and applied only a very general standard. It did not create any "clearly established Federal law" to which the state court decision could be contrary.

If *Darden* is far removed from *Weaver*, *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), another case relied on by the Eighth Circuit, is even more so. *Donnelly* involved

prosecutorial closing remarks in a pre-*Furman*[4] unitary capital trial in which the jury found the defendant guilty of first-degree murder and recommended against the death penalty. After defendant's jointly tried codefendant pleaded guilty, the prosecutor, in his summation, remarked to the jury, in reference to defendant and his counsel: "They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." *Id.*, at 640. In response, the trial judge later gave a curative instruction. The issue, as described by this Court, was whether the remark "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 643. This Court held that, since the remark was ambiguous, was but one moment in an extended trial, and was followed by specific disapproving instructions, no due process violation occurred. *Id.*, at 645.

Donnelly is markedly different from *Weaver*. First, the remarks at issue are quite dissimilar. The *Donnelly* prosecutor imputed certain beliefs to the defendant and his attorney, which is a far cry from the "Innocence Remark," the "Soldier Analogy," or the "Deterrence Statement" in *Weaver*. Second, there was no separate sentencing phase in the *Donnelly* case, whereas Weaver had a bifurcated trial only the second stage of which is at issue. Third, the *Donnelly* issue concerned the unfairness of the conviction, not, as in *Weaver*, the sentence. Fourth, and finally, unlike *Weaver*, there was no death sentence in *Donnelly*, as defendant was sentenced to life imprisonment. All told, *Donnelly* cannot be considered clearly established federal law with respect to Weaver's very different case.

To support its clearly-established-federal-law contention the Eighth Circuit also cited *Caldwell* and *Romano* v. *Oklahoma*. We have already noted, above, the significant differences between a *Caldwell*-Eighth Amendment claim and a due

---

4. *Furman* v. *Georgia*, 408 U. S. 238 (1972).

process claim. This Court, in *Sawyer* v. *Smith*, 497 U. S. 227 (1990), stressed that very difference:

> "Rather than focusing on the prejudice to the defendant that must be shown to establish a *Donnelly* [due process] violation, our concern in *Caldwell* was with the 'unacceptable risk' that misleading remarks could affect the reliability of the sentence. . . . *Caldwell* must therefore be read as providing an additional measure of protection against error, beyond that afforded by *Donnelly*, in the special context of capital sentencing." *Id.*, at 244 (citation omitted).

A due process claim asks whether the alleged misconduct so infected the proceeding with unfairness as to make the result a denial of due process. See *Donnelly*, 416 U. S., at 643. *Caldwell* looks to a much different issue: whether the jury was "affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U. S., at 9. Thus, the *Caldwell* line of cases, including, in part, *Romano*, cannot be considered clearly established federal law for Weaver's due process claims.

Romano addressed both *Caldwell* and due process issues. In *Romano*, the State sought to prove two aggravating circumstances (previous conviction of a violent felony and continuing threat to society) by evidence that defendant had previously been convicted of first-degree murder and sentenced to death. Romano argued that evidence of the prior death sentence deprived the sentencing determination of the reliability that the Eighth Amendment requires. This Court rejected the *Caldwell* claim on the grounds that the death sentence evidence was neither false nor pertinent to the jury's role in sentencing. *Romano*, 512 U. S., at 9.

Respecting Romano's due process claim, this Court, applying the analytical framework developed in *Donnelly*, asked "whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.*, at 12. The answer

was negative, primarily because the trial court's instructions "clearly and properly described the jurors' paramount role in determining petitioner's sentence, and they also explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove." *Id.*, at 13. Moreover, even without the evidence of the prior death sentence, "the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed." *Ibid.* Alternatively, this Court held that no due process violation occurred because "it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so." *Id.*, at 14.

While *Romano* established that the Due Process Clause of the Fourteenth Amendment applies to the sentencing phase of capital trials, it did not establish that the same due process analysis applies to prosecutorial closing remarks in the sentencing hearing—the issue in *Weaver*. The *Romano* analysis would not have resolved the *Weaver* issue. Instructing the jury on its paramount role in determining petitioner's sentence, and explicitly limiting the jurors' consideration of aggravating factors to those which the State sought to prove, would not affect the prejudice to defendant, if any, caused by the Weaver prosecutor's comments. In short, because *Romano* simply is not a prosecutorial-closing-remarks case, its facts are so different from those of *Weaver* that it cannot be considered clearly established federal law for Weaver's due process claims.

The overall conclusion, therefore, is compelling: none of the four United States Supreme Court cases cited by the Eighth Circuit Court of Appeals—neither *Caldwell*, *Romano*, *Donnelly*, nor *Darden*—constitutes "clearly established Federal law" controlling with respect to Weaver's prosecutorial remarks claim. Consequently, the Eighth Circuit acted improperly when it declined to defer to the Supreme Court of Missouri and approved the issuance of the writ of habeas corpus.

This conclusion gains additional support from the division in the case law on the issues raised by Weaver's case. In *Carey* v. *Musladin*, 549 U. S. __, 127 S. Ct. 649, 654, 166 L. Ed. 2d 482, 489 (2006), this Court suggested that divergent treatment of the relevant claims by lower courts is an indicator of the lack of guidance from this Court, *i.e.*, the lack of United States Supreme Court holdings specific enough and factually similar enough to clearly establish a controlling rule. Such a divergence is evident with respect to the prosecutorial comment issues in *Weaver*.

The Eighth Circuit opinion in *Weaver* sorted the prosecutor's remarks into five categories:

> "(1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')." 438 F. 3d, at 840.

We examine some of the case law relevant to each of these categories.

(1) Although the Eighth Circuit, in *Weaver*, found that the soldier analogy "eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment," *ibid.*, the Eleventh Circuit expressed partial approval of similar remarks. See *Brooks* v. *Kemp*, 762 F. 2d 1383, 1412 (CA11 1985), vacated on other grounds, 478 U. S. 1016 (1986) (approving part of the argument: "the analogy of the death penalty to killing in a war was appropriate insofar as it implied that imposing death, while difficult, is at times sanctioned by the

state because of compelling reasons (national security or deterring crime)").

(2) The Eighth Circuit's *Weaver* decision found statements about the prosecutor's personal belief in the death penalty "inappropriate and contrary to a reasoned opinion by the jury." 438 F. 3d, at 841. By contrast, however, the Ohio Supreme Court endorsed the practice, noting that "it is difficult for prosecutors to argue vigorously for the death penalty without making what might arguably be statements of personal opinion." *State* v. *Tyler*, 50 Ohio St. 3d 24, 41, 553 N. E. 2d 576, 595 (1990).

(3) The Court of Appeals characterized what it called "Claim 2M" as a "war on drugs" argument, stating that the prosecutor urged the jury to impose the death penalty in order to "sustain a societal effort as part of the 'war on drugs.' " 438 F. 3d, at 840. With respect, this misrepresents the prosecutor's remarks. Four times within the relevant address to the jury the prosecutor either expressly or impliedly referred to general deterrence, the theory that punishing offenders discourages crime by others. See *supra*, at 13, n. 3. Not once did he suggest that Weaver should be executed solely because he was a drug dealer. And, although a few words taken out of context seem to suggest that the death penalty is needed to fight drug dealers,[5] the general thrust is that the death penalty is necessary to protect the community from drug dealers who commit murder, especially murder for hire. "[T]he message you want to send to the drug dealers, the dope peddlers *and the hit men they hire to do their dirty deeds* . . . has to be death for these types of people." *Id.*, at 837 (emphasis added). As then-Justice

---

5. For instance, the prosecutor said, "This case—I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case." 438 F. 3d, at 836.

Rehnquist, speaking for this Court, cautioned: "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U. S., at 647.

The courts are not in full agreement on the appropriateness of general deterrence arguments. Some disapprove. See *State* v. *Rose*, 548 A. 2d 1058, 1092 (N.J. 1988); *State* v. *Irick*, 762 S. W. 2d 121 (Tenn. 1988) (improper but not reversible error). Others have sanctioned such comments. See *Collins* v. *Francis*, 728 F. 2d 1322, 1339-1340 (CA11 1984); *Edwards* v. *State*, 737 So. 2d 275, 300 (Miss. 1999); *Witter* v. *State*, 112 Nev. 908, 924, 921 P. 2d 886, 897 (1996), overruled on other grounds, *Fore* v. *State*, 118 Nev. 330, 45 P. 3d 404 (2002).

(4) This category refers to one passing remark by the prosecutor which is here set out in full: "I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." *Weaver*, 438 F. 3d, at 837. This was followed immediately by an objection from Weaver's counsel. The trial court sustained the objection and instructed the jury to disregard the statement.

Although courts are divided on the propriety of comments invoking the prestige of a prosecutor's office, some of the cases are distinguishable from *Weaver*, where the prosecutor merely stated that he was the "top law enforcement officer" with responsibility for selecting cases for capital prosecution. This correct factual statement is different from assertions that imply that the prosecutor personally approves the death penalty in the case, or that there are facts outside the evidence that make the case especially appropriate for the death penalty.

Disapproving but distinguishable cases include *Newlon* v. *Armontrout*, 885 F. 2d 1328 (CA8 1989) (the prosecutor's emphasis on his authority as the "top law enforcement officer

of the County" combined with other remarks infected the penalty proceeding with an unfairness that violated due process), *Brooks*, 762 F. 2d, at 1410 (discussion of the prosecutor's practice of seeking death only in a few cases during the past years was improper), and *Clark* v. *Commonwealth*, 833 S. W. 2d 793 (Ky. 1991) (prosecutor erroneously minimized the responsibility of the jury for imposing the death sentence by arguing that the prosecutor's office infrequently seeks the death penalty and that this was "an extraordinary case as envisioned by our Legislature" for the death penalty). But see *State* v. *Knighton*, 436 So. 2d 1141, 1154 (La. 1983) (the prosecutor's statement that "[i]t's not every case the District Attorney's office seeks the death penalty" did not inflame the jury and deprive defendant of a fair trial).

(5) This final category consists of arguments characterized by the Eighth Circuit as "designed to appeal to the emotions of the jury" and "culminating in a statement that the jury should 'kill [Weaver] now.' " *Weaver*, 438 F. 3d, at 840. The prosecutor's actual words were as follows:

> "Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now." *Id.*, at 836.

We do not agree that this argument is designed solely to appeal to the emotions of the jury as it contains a reasoned argument comparing a decision to impose a death sentence to another legally justified killing, viz., killing in self-defense. Nevertheless, outside of a few Missouri cases, we could find no case law supporting or disapproving such an argument. See *Newlon* v. *Armontrout*, 885 F. 2d 1328 (CA8 1985) (where the prosecutor expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the

county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant, the penalty phase of the trial was, in the totality of the circumstances, fundamentally unfair); *Shurn* v. *Delo*, 177 F. 3d 662 (CA8 1999) (same result where the same prosecutor gave essentially the same argument that led to reversal of the death sentence in *Newlon*).

In conclusion, the case law either is split or inconclusive on the type of prosecutorial arguments made in *Weaver*. This strongly suggests that there is no clearly established law from this Court on these particular issues. Such evidence, along with a close examination of the cases from this Court actually cited by the Eighth Circuit, leads to the conclusion that the Court of Appeals relied on its own case law along with speculative inferences about the appropriate legal standards drawn from related United States Supreme Court cases. This may be sound legal reasoning in a direct review case. But it is not what Congress meant when it forbade the granting of a writ of habeas corpus except for state court decisions that are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be reversed.

January, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(Intentionally left blank)

APPENDIX

APPENDIX

The Court of Appeals for the Eighth Circuit quoted three statements of the prosecutor at issue in this case. *Weaver* v. *Bowersox*, 438 F. 3d 832, 835-837 (CA8 2006). These statements, reproduced below, were identified by the parties as Claim 2E, Claim 2F, and Claim 2M.

Claim 2E:

So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

Claim 2F:

Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it? I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.

Claim 2M:

It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent

society. You have to give a message here. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now.

. . . .

This case—I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case. When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

. . . .

And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're

guilty, we're going to give you life in prison? That's not the right message.

. . . .

The message has to be death for these types of people. That's the only message they are going to understand. The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It doesn't just pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

. . . .

You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.

. . . .

It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

Supreme Court, U.S.
FILED
JAN 2 2 2007
OFFICE OF THE CLERK

(9)

No. 06-313
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
573-751-3321
573-751-3825 fax
Counsels for Petitioner

PHILIP HORWITZ
Attorney at Law
3460 Hampton, Suite 205
St. Louis, MO 63139
314-621-1617
Counsel for Respondent

Petition for Certiorari filed August 29, 2006
Certiorari Granted December 7, 2006

TABLE OF CONTENTS

Court of Appeals docket entries, No. 03-2880 1

Court of Appeals docket entries, No. 03-2938 15

District Court docket entries, No. 4:96-CV-2220 CAS . . . 28

Excerpt from Mr. Weaver's brief on consolidated appeal to Missouri Supreme Court 44

The following items were printed in the Appendix to Petition for Writ of Certiorari

Transcript of penalty phase closing argument in *State of Missouri v. William L. Weaver*, No. 565118B is located at A-274 of the Appendix to Petition for Writ of Certiorari

Penalty phase jury instructions in *State of Missouri v. William L. Weaver*, No. 565118B (St. Louis County Circuit Court) is located at A-299 of the Appendix to Petition for Writ of Certiorari

Findings of Fact and Conclusions of Law in *William L. Weaver v. State of Missouri*, No. 603615 (St. Louis County Circuit Court Nov. 29, 1994) is located at A-258 of the Appendix to Petition for Writ of Certiorari

Opinion of the Missouri Supreme Court in *State v. Weaver*, No. 71051 (Mo. banc Dec. 19, 1995) is located at A-221 of the Appendix to Petition for Writ of Certiorari

Memorandum & Order in *William Weaver v. Michael Bowersox*, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9,

1999) is located at A-203 of the Appendix to Petition for Writ of Certiorari

Opinion in *William Weaver v. Michael Bowersox*, No. 99-3462 (8th Cir. February 23, 2001) is located at A-187 of the Appendix to Petition for Writ of Certiorari

Memorandum & Order in *William Weaver v. Michael Bowersox*, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003) is located at A-23 of the Appendix to Petition for Writ of Certiorari

Opinion in *William Weaver v. Michael Bowersox*, Nos. 03-2880/2938 (8th Cir. February 16, 2006 (corrected February 23, 2006)) is located at A-2 of the Appendix to Petition for Writ of Certiorari

Order Denying Rehearing and Rehearing En Banc in *William Weaver v. Michael Bowersox*, Nos. 03-2880/2938 (8th Cir. May 31, 2006) is located at A-220 of the Appendix to Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2880

WILLIAM WEAVER, Appellee.

v.

MICHAEL BOWERSOX, Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
7/24/03	Prisoner Case Docketed Dist. Ct. Office: St. Louis [1668541]
7/24/03	CERTIFIED copies notice of appeal, docket entries, and judgment dated 5/7/03 and amended judgment dated 7/14/03 from district court [03-2880] [1668545]
7/24/03	BRIEFING SCHEDULED: [03-2880] Joint Apndx due on 9/2/03; Aplnt brief due on 9/2/03; Aplee brief due on 10/2/03; Reply brief due on 10/16/03;
7/24/03	RECORDS received: Original File, consisting of 2 Volume(s), Location STL. [03-2880]
7/24/03	Record Sent out of the office to district court. Records Included: 2 volumes OF; . [03-2880]
7/24/03	DEATH PENALTY CASE. [03-2880]
7/24/03	CJA 30 voucher issued for appeal. Eric W.

Butts of St. Louis, MO is hereby appointed under the Criminal Justice Act to represent appellee Voucher #03288001. Nunc Pro Tunc:7/21/03 [03-2880] [1669398]

7/24/03 CJA 30 voucher issued for appeal. Philip M. Horwitz of St. Louis, MO is hereby appointed under the Criminal Justice Act to represent appellee Voucher #03288002. Nunc Pro Tunc: 7/21/03 [03-2880] [1669399]

7/30/03 APPEARANCE for appellant, attorney Stephen David Hawke [03-2880] [1671219]

8/4/03 CROSS APPEAL BRIEFING SCHEDULE: Appendix due on 9/23/03 in 03-2880, in 03-2938 Aplnt brief due on 9/23/03 in 03-2880, in 03-2938 Aplee/cr. Aplnt brief due on 10/23/03 in 03-2880, in 03-2938 Reply brief of aplnt/cr. aplee due on 11/24/03 in 03-2880, in 03-2938 Reply brf aplee/cr. aplnt due 12/8/03 in 03-2880, in 03-2938 [03-2880, 03-2938]

8/4/03 RECORDS received: Original File, consisting of 2 Volume(s), Location STL. [03-2880, 03-2938]

8/4/03 Record Sent out of the office to district court. Records Included: 2 volumes OF; . [03-2880, 03-2938]

9/19/03 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 10/14/03 . [03-2880, 03-2938] [1688403] w/service 9/18/03

9/19/03	ORDER filed: granting appellant motion for extension of time to file brief [1688403-1] [1688404] in 03-2880, 03-2938 Aplnt brief now due on 10/14/03 in 03-2880, in 03-2938 .
10/10/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/4/03. [03-2880, 03-2938] [1695974] w/service 10/10/03.
10/14/03	ORDER filed: granting appellant motion for extension of time to file brief in 03-2880, 03-2938. [169574-1] [1695976] Aplnt brief and appendix now due on 11/4/03.
11/5/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/14/03. [03-2880, 03-2938] [1704865] w/service 11/4/03.
11/6/03	ORDER filed: granting appellant motion for extension of time to file brief [1704865-1] [1704885] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/14/03 in 03-2880, in 03-2938.
11/14/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/21/03. [03-2880, 03-2938] [1707469] w/service 11/14/03
11/17/03	ORDER filed: granting appellant motion for extension of time to file brief [1707469-1] [1707471] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/21/03 in 03-2880, in 03-2938.

11/21/03 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowersox in 03-2938, to file brief out of time [03-2880, 03-2938] [1710615] w/service 11/21/03

11/25/03 ORDER filed: granting appellant motion to file brief out of time [1710615-1] The Clerk is directed to file appellant's brief as of this date. [1710616] in 03-2880, 03-2938

11/25/03 BRIEF FILED - Brief of Appellant - Michael Bowersox in 03-2880, 03-2938 8,289 words w/addendum 10 copies - w/service 11/24/03 w/disk Defects: no appendix (appendix requested). [03-2880, 03-2938] [1710761]

11/26/03 RECORDS received: Appendix filed by Appellant Michael Bowersox in 03-2880, 03-2938 consisting of 1 Volume(s), 4 Copies [03-2880, 03-2938]

12/19/03 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 1/19/04. [03-2880, 03-2938] w/service 12/15/03

12/19/03 ORDER filed: granting appellee motion extension of time to file second brief. [1718416-1] [1718418] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 1/20/04 in 03-2880, in 03-2938

1/16/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 2/19/04. [03-2880, 03-2938] w/service 1/16/04

1/21/04	ORDER filed: granting appellee motion extension of time to file second brief. [1726976-1] [1726977] in 03-2880, 03-2938, granting appellee motion extension of time to file second brief. [1718416-1] [1726977] in 03-2938, 03-2880 Aplee/cr. aplnt brief now due on 2/19/04 in 03-2880, in 03-2938
2/19/04	MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/4/04. [03-2880, 03-2938] w/service 2/19/04
2/20/04	ORDER filed: granting appellee motion extension of time to file second brief. [1737811-1] [1737815] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 3/4/04 in 03-2880, in 03-2938
3/4/04	MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/15/04. [03-2880, 03-2938] w/service 3/4/04
3/5/04	ORDER filed: granting appellee motion extension of time to file second brief. [1743182-1] [1743183] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. aplnt brief now due on 3/15/04 in 03-2880, in 03-2938
3/19/04	MOTION of aplee, William Weaver in 03-2880, 03-2938, to file brief out of time [03-2880, 03-2938] [1748358] w/service 3/19/04
3/19/04	ORDER filed: granting appellee motion to file brief out of time [1748358-1] The Clerk is directed to file appellee's brief as of this date.

[1748359] in 03-2880, 03-2938

3/19/04 BRIEF FILED - Brief of Aplee/cr. Aplnt - Appellee William Weaver in 03-2880, 03-2938. 9,766 words - - 10 copies - w/service 3/19/04. w/disk [03-2880, 03-2938] [1748363]

4/20/04 MOTION of aplnt/cross-aplee, Michael Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/3/04. [03-2880, 03-2938] w/service 4/19/04.

4/20/04 ORDER filed: granting appellant's motion extension of time to file reply brief (third brief) in 03-2880, 03-2938. [1758898-1] [1758904] Appellant/Cross-Appellee reply brief (third brief) due on 5/3/04

5/3/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/13/04. [03-2880, 03-2938] w/service 5/3/04

5/4/04 ORDER filed: granting appellant motion extension of time to file reply brief [1763394-1] [1763396] in 03-2880, 03-2938 Aplnt/cr. aplee reply brief due on 5/13/04 in 03-2880, in 03-2938

5/26/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, to file reply brief out of time [03-2880, 03-2938] [1771584] w/service 5/26/04

5/27/04 ORDER filed: granting appellant motion to file brief out of time [1771584-1] The Clerk is

directed to file appellant's reply brief as of this date. [1771592] in 03-2880, 03-2938

5/27/04 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Michael Bowersox in 03-2880, 03-2938. 13 pages - - 10 copies - w/service 5/21/04. w/disk [03-2880, 03-2938] [1771607]

6/1/04 TO SCREENING to rw. [03-2880, 03-2938]

6/3/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 6/18/04 . [03-2880, 03-2938] w/service 6/3/04

6/4/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1774153-1] [1774155] Aplee/cr. Aplnt reply brief now due on 6/18/04 in 03-2880, in 03-2938

6/9/04 RETURNED from Screening (30) [03-2880, 03-2938]

6/18/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file fourth brief until 7/2/04 . [03-2880, 03-2938] w/service 6/18/04

6/22/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1780083-1] [1780086] in 03-2880, 03-2938 Aplee/cr. Aplnt reply brief now due on 7/2/04 in 03-2880, in 03-2938

7/6/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 7/21/04 . [03-2880, 03-2938] w/service 7/6/04

7/8/04 ORDER filed: granting appellee,motion ext. of time to file fourth brief [1785563-1] [1785566] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. Aplnt reply brief now due on 7/21/04 in 03-2880, in 03-2938

7/23/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, to file reply brief out of time [03-2880, 03-2938] [1792264] w/service 7/23/04

7/27/04 ORDER filed: granting appellee motion to file brief out of time [1792264-1] The Clerk is directed to file appellee/cross-appellant's reply brief as of this date. [1792284] in 03-2880, 03-2938

7/27/04 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - William Weaver in 03-2880, 03-2938 . 10 pages - - 10 copies - w/service 7/23/04 . w/disk [03-2880, 03-2938] [1792287]

8/13/04 *SET FOR ARGUMENT* - September 2004 in St. Louis, Missouri

9/3/04 APPEARANCE for appellee, attorney Eric W. Butts [03-2880] [1807933]

9/13/04 APPEARANCE for appellant, attorney Michael Joseph Spillane [03-2880] [1810142]

9/13/04 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Kermit E. Bye, Circuit Judge, Pasco M. Bowman, Circuit Judge, Michael J. Melloy, Circuit Judge. Michael Joseph Spillane for Appellant Michael Bowersox in 03-2880. Eric W. Butts for Appellee William

Weaver in 03-2880. Rebuttal by: Michael Spillane. RECORDED. [03-2880, 03-2938]

3/17/05 RECORDS received: Exhibits. Located in: STL, consisting of one box containing 9 folders of respondent's exhibits A - G - which includes state court transcripts and records. [Return to Dist. Ct. at end of case] [03-2880, 03-2938]

2/16/06 THE COURT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. OPINION FILED by Michael J. Melloy, Authoring Judge. PUBLISHED. CONCUR by Kermit E. Bye. CONCUR and DISSENT by Pasco M. Bowman. [03-2880, 03-2938] [2010529]

2/16/06 JUDGMENT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. The judgment of the lower court is AFFIRMED in accordance with the opinion. [03-2880, 03-2938] [2010532]

2/23/06 Opinion CORRECTION. On page 17, in the third line of the second full paragraph, it now reads "ante at 10, 11." On that same page, in the third line of the third paragraph, it now reads "ante at 9"; and on page 18, in the first line, it now reads "ante at 11" and in the sixth line it now reads "at 11 (citing Supreme Court cases at 11-12)." [03-2880, 03-2938]

3/1/06 MOTION of aplnt, Michael Bowersox in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/1/06

3/3/06 ORDER filed: granting appellant motion for ext.

of time to file rehearing [2016314-1] [03-2880, 03-2938] [2016319] in 03-2880, 03-2938

3/7/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/2/06

3/7/06 ORDER filed: granting appellee/cross-appellant motion for ext. of time to file rehearing to 3/16/06 [2017801-1] [03-2880, 03-2938] [2017802] in 03-2880, 03-2938

3/15/06 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowers in 03-2938, for extension of time to file petition for rehearing until 3/30/06. TO COURT w/service 3/15/06

3/16/06 MOTION of aplee, William Weaver in 03-2880, William Weaver in 03-2938, for extension of time to file petition of rehearing until 3/23/06. TO COURT w/service 3/16/06

3/22/06 JUDGE ORDER: granting appellant and appellee motion for ext. of time to file rehearing until March 30, 2006. [2022708-1] [03-2880, 03-2938] [2023773] in 03-2938, 03-2880

3/24/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee/Cross-Appellant William Weaver in 03-2880/03-2938, w/service 3/23/06. TO COURT [03-2880, 03-2938]

3/29/06 MOTION of aplnt/cross-appellee, William Weaver in 03-2880/2938, for extension of time

to file petition for rehearing until 4/3/06. TO COURT w/service 3/29/06

4/3/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant/Cross Appellee Michael Bowersox in 03-2880/2938, w/service 4/3/06. TO COURT [03-2880, 03-2938]

4/4/06 JUDGE ORDER: granting appellant motion for ext. of time to file rehearing to 4/3/06. [2027616-1] [03-2880, 03-2938] [2028744] in 03-2880, 03-2938

4/7/06 Clerk letter sent notifying that parties have an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] in 03-2880/2938, and petition for Rehearing with petition for rehearing en banc filed by William Weaver [2028760-1] in 03-2880/2938. [03-2880, 03-2938] Response due by 4/17/06 in 03-2880, in 03-2938

4/14/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/28/06. [03-2880, 03-2938] [2034973] w/service 4/14/06

4/17/06 MOTION of aplnt/cross-appellee, Michael Bowersox in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/24/06. [03-2880, 03-2938] [2034974] w/service 4/17/06

4/19/06 ORDER filed: granting appellee motion extension of time to file response to petition. [2034973-1] [03-2880, 03-2938] [2035047] in 03-2880, 03-2938, granting appellant motion extension of time to file response to petition. [2034974-1] [03-2880, 03-2938] [2035047] in 03-2938, 03-2880 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938

4/27/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 5/3/06. [03-2880, 03-2938] [2039991] w/service 4/27/06

4/28/06 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by William Weaver [2028760-1] [2040546] in 03-2880/2938. Response filed by Michael Bowersox in 03-2880/2938. w/service 4/28/06. TO COURT [03-2880, 03-2938]

5/2/06 ORDER filed: granting appellee motion extension of time to file response to petition to 5/3/06. [2039991-1] [03-2880, 03-2938] [2039998] in 03-2880, 03-2938 Response to pet. for rehearing due on 5/3/06 in 03-2880, in 03-2938

5/3/06 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] [2040555] in 03-2880/2938. Response filed by William Weaver in 03-2880/2938. w/service 5/2/06. TO

COURT [03-2880, 03-2938]

5/31/06 JUDGE ORDER: The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied. Chief Judge Loken, Judge Wollman, Judge Riley, Judge Colloton, and Judge Gruender would grant Michael Bowersox's petition for rehearing en banc. Judge Benton did not participate in the consideration or decision of this matter. [2028766-1] [2050489] [2028760-1] [03-2880, 03-2938] [2050489] in 03-2880, 03-2938 - Published Order.

6/22/06 MANDATE ISSUED [03-2880, 03-2938]

6/23/06 RECEIPT for Mandate. [03-2880, 03-2938] [2062404]

8/9/06 Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 box of Exh.; . [03-2880, 03-2938]

9/11/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 8/29/06. Supreme Ct. Case No.: 06-313 [03-2880, 03-2938] [2090439]

10/17/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 10/4/06. Supreme Ct. Case No.: 06-7089 [03-2880, 03-2938] [2111948]

12/12/06 U.S. Supreme Court order: The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of

certiorari is granted. [2111948-1] [2090439-1] in 03-2880, 03-2938. Order filed in the Supreme Court on 12/7/06 Sup. Ct. No. 06-313 [03-2880, 03-2938]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2938

WILLIAM WEAVER, Appellant,

v.

MICHAEL BOWERSOX, Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
8/4/03	Prisoner Case Docketed Dist. Ct. Office: St. Louis [1671610]
8/4/03	DEATH PENALTY CASE. [03-2938]
8/4/03	CERTIFIED copies of notice of cross-appeal, docket entries, and judgment dated 5/7/03 and order 7/14/03 and amended judgment 7/14/03 from district court [03-2938] [1671615]
8/4/03	CJA 30 voucher issued for appeal. Eric W. Butts in 03-2938 of St. Louis, MO is hereby appointed under the Criminal Justice Act to represent appellant Voucher #03293801. Nunc Pro Tunc: 7/30/03 [03-2938] [1671617]
8/4/03	CJA 30 voucher issued for appeal. Philip M. Horwitz in 03-2938 of Clayton, MO is hereby appointed under the Criminal Justice Act to represent appellant Voucher #03293802. Nunc Pro Tunc: 7/30/03 [03-2938] [1671618]

8/4/03	CROSS APPEAL BRIEFING SCHEDULE: Appendix due on 9/23/03 in 03-2880, in 03-2938 Aplnt brief due on 9/23/03 in 03-2880, in 03-2938 Aplee/cr. Aplnt brief due on 10/23/03 in 03-2880, in 03-2938 Reply brief of aplnt/cr. aplee due on 11/24/03 in 03-2880, in 03-2938 Reply brf aplee/cr. aplnt due 12/8/03 in 03-2880, in 03-2938 [03-2880, 03-2938]
8/4/03	RECORDS received: Original File, consisting of 2 Volume(s), Location STL. [03-2880, 03-2938]
8/4/03	Record Sent out of the office to district court. Records Included: 2 volumes OF; . [03-2880, 03-2938]
8/6/03	APPEARANCE for appellant, attorney Eric W. Butts [03-2938] [1673907]
8/7/03	APPEARANCE for appellee, Stephen David Hawke [03-2938] [1674521]
9/19/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 10/14/03. [03-2880, 03-2938] [1688403] w/service 9/18/03
9/19/03	ORDER filed: granting appellant motion for extension of time to file brief [1688403-1] [1688404] in 03-2880, 03-2938 Aplnt brief now due on 10/14/03 in 03-2880, in 03-2938
10/10/03	MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/4/03 . [03-2880, 03-2938] [1695974]

w/service 10/10/03.

10/14/03 ORDER filed: granting appellant motion for extension of time to file brief in 03-2880, 03-2938 [1695974-1] [1695976] Aplnt brief and appendix now due on 11/4/03.

11/5/03 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/14/03 . [03-2880, 03-2938] [1704864] w/service 11/4/03

11/6/03 ORDER filed: granting appellant motion for extension of time to file brief [1704865-1] [1704885] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/14/03 in 03-2880, in 03-2938 .

11/14/03 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file brief until 11/21/03. [03-2880, 03-2938] [1707469] w/service 11/14/03

11/17/03 ORDER filed: granting appellant motion for extension of time to file brief [1707469-1] [1707471] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplnt brief now due on 11/21/03 in 03-2880, in 03-2938.

11/21/03 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowersox in 03-2938, to file brief out of time [03-2880, 03-2938] [1710615] w/service 11/21/03

11/25/03 ORDER filed: granting appellant motion to file brief out of time [1710615-1] The Clerk is

directed to file appellant's brief as of this date [1710616] in 03-2880, 03-2938

11/25/03 BRIEF FILED - Brief of Appellant - Michael Bowersox in 03-2880, 03-2938 8,289 words w/addendum 10 copies - w/service 11/24/03 w/disk Defects: no appendix (appendix requested). [03-2880, 03-2938] [1710761]

11/26/03 RECORDS received: Appendix filed by Appellant Michael Bowersox in 03-2880, 03-2938 consisting of 1 Volume(s), 4 Copies. [03-2880, 03-2938]

12/19/03 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 1/19/04. [03-2880, 03-2938] w/service 12/15/03

12/19/03 ORDER filed: granting appellee motion extension of time to file second brief. [1718416-1] [1718418] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 1/20/04 in 03-2880, in 03-2938

1/16/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 2/19/04 . [03-2880, 03-2938] w/service 1/16/04

1/21/04 ORDER filed: granting appellee motion extension of time to file second brief. [1726976-1] [1726977] in 03-2880, 03-2938, granting appellee motion extension of time to file second brief. [1718416-1] [1726977] in 03-2938, 03-2880 Aplee/cr. aplnt brief now due on 2/19/04 in 03-2880, 03-2938

2/19/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/4/04 . [03-2880, 03-2938] w/service 2/19/04

2/20/04 ORDER filed: granting appellee motion extension of time to file second brief. [1737811-1] [1737815] in 03-2880, 03-2938 Aplee/cr. aplnt brief now due on 3/4/04 in 03-2880, in 03-2938

3/4/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file brief until 3/14/04. [03-2880, 03-2938] w/service 3/4/04

3/5/04 ORDER filed: granting appellee motion extension of time to file second brief. [1743182-1] [1743183] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. aplnt brief now due on 3/14/04 in 03-2880, in 03-2938

3/19/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, to file brief out of time [03-2880, 03-2938] [1748358] w/service 3/19/04

3/19/04 ORDER filed: granting appellee motion to file brief out of time [1748358-1] The Clerk is directed to file appellee's brief as of this date. [1748359] in 03-2880, 03-2938

3/19/04 BRIEF FILED - Brief of Aplee/cr. Aplnt - Appellee William Weaver in 03-2880, 03-2938. 9,766 words - - 10 copies - w/service 3/19/04. w/disk [03-2880, 03-2938] [1748363]

4/20/04 MOTION of aplnt/cross-aplee, Michael

Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/3/04. [03-2880, 03-2938] w/service 4/19/04.

4/20/04 ORDER filed: granting appellant's motion extension of time to file reply brief (third brief) in 03-2880, 03-2938. [1758898-1] [1758904] Appellant/Cross-Appellee reply brief (third brief due on 5/3/04.

5/3/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, for extension of time to file reply brief until 5/13/04. [03-2880, 03-2938] w/service 5/3/04

5/4/04 ORDER filed: granting appellant motion extension of time to file reply brief [1763394-1] [1763396] in 03-2880, 03-2938 Aplnt/cr. aplee reply brief due on 5/13/04 in 03-2880, in 03-2938

5/26/04 MOTION of aplnt, Michael Bowersox in 03-2880, 03-2938, to file reply brief out of time [03-2880, 03-2938] [1771584] w/service 5/26/04

5/27/04 ORDER filed: granting appellant motion to file brief out of time [1771584-1] The Clerk is directed to file appellant's reply brief as of this date. [1771592] in 03-2880, 03-2938

5/27/04 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Michael Bowersox in 03-2880, 03-2938. 13 pages - - 10 copies - w/service 5/21/04. w/disk [03-2880, 03-2938] [1771607]

6/1/04 TO SCREENING to rw. [03-2880, 03-2938]

6/3/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 6/18/04 . [03-2880, 03-2938] w/service 6/3/04

6/4/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1774153-1] [1774155] Aplee/cr. Aplnt reply brief now due on 6/18/04 in 03-2880, in 03-2938

6/9/04 RETURNED from Screening (30) [03-2880, 03-2938]

6/18/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, for extension of time to file fourth brief until 7/2/04 . [03-2880, 03-2938] w/service 6/18/04

6/22/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1780083-1] [1780086] in 03-2880, 03-2938 Aplee/cr. Aplnt reply brief now due on 7/2/04 in 03-2880, in 03-2938

7/6/04 MOTION of aplee, William Weaver in 03-2880, for extension of time to file fourth brief until 7/21/04 . [03-2880, 03-2938] w/service 7/6/04

7/8/04 ORDER filed: granting appellee motion ext. of time to file fourth brief [1785563-1] [1785566] in 03-2880, 03-2938 NO FURTHER EXTENSIONS. Aplee/cr. Aplnt reply brief now due on 7/21/04 in 03-2880, in 03-2938

7/23/04 MOTION of aplee, William Weaver in 03-2880, 03-2938, to file reply brief out of time [03-2880,

03-2938] [1792264] w/service 7/23/04

7/27/04 ORDER filed: granting appellee motion to file brief out of time [1792264-1] The Clerk is directed to file appellee/cross-appellant's reply brief as of this date. [1792284] in 03-2880, 03-2938

7/27/04 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - William Weaver in 03-2880, 03-2938 .10 pages - - 10 copies - w/service 7/23/04 . w/disk [03-2880. 03-2938] [1792287]

8/13/04 *SET FOR ARGUMENT* - September 2004 in St. Louis, Missouri

9/13/04 APPEARANCE for appellee, attorney Michael Joseph Spillane [03-2938] [1810145]

9/13/04 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Kermit E. Bye, Circuit Judge, Pasco M. Bowman, Circuit Judge, Michael J. Melloy, Circuit Judge. Michael Joseph Spillane for Appellant Michael Bowersox in 03-2880. Eric W. Butts for Appellee William Weaver in 03-2880. Rebuttal by: Michael Spillane. RECORDED. [03-2880, 03-2938]

3/17/05 RECORDS received: Exhibits, Located in: STL, consisting of one box containing 9 folders of respondent's exhibits A - G - which includes state court transcripts and records. [Return to Dist. Ct. at end of case] [03-2880, 03-2938]

2/16/06 THE COURT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. OPINION FILED

by Michael J. Melloy, Authoring Judge. PUBLISHED. CONCUR by Kermit E. Bye. CONCUR and DISSENT by Pasco M. Bowman [03-2880, 03-2938] [2010529]

2/16/06 JUDGMENT: Kermit E. Bye, Pasco M. Bowman, Michael J. Melloy. The judgment of the lower court is AFFIRMED in accordance with the opinion. [03-2880, 03-2938] [2010532]

2/23/06 Opinion CORRECTION. On page 17, in the third line of the second ful paragraph, it now reads "ante at 10, 11." On that same page, in the third line of the third paragraph, it now reads "ante at 9"; and on page 18, in the first line, it now reads "ante at 11" and in the sixth line it now reads "at 11 (citing Supreme Court cases at 11-12)." [03-2880, 03-2938]

3/1/06 MOTION of aplnt, Michael Bowersox in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/1/06

3/3/06 ORDER filed: granting appellant motion for ext. of time to file rehearing [2016314-1] [03-2880, 03-293] [2016319] in 03-2880, 03-2938

3/7/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file petition for rehearing until 3/16/06. w/service 3/2/06

3/7/06 ORDER filed: granting appellee/cross-appellant motion for ext. of time to file rehearing to 3/16/06 [2017801-1] [03-2880, 03-2938]

[2017802] in 03-2880, 03-2938

3/15/06 MOTION of aplnt, Michael Bowersox in 03-2880, Michael Bowersox in 03-2938, for extension of time to file petition for rehearing until 3/30/06. TO COURT w/service 3/15/06

3/16/06 MOTION of aplee, William Weaver in 03-2880, William Weaver in 03-2938, for extension of time to file petition for rehearing until 3/23/06. TO COURT w/service 3/16/06

3/22/06 JUDGE ORDER: granting appellant and appellee motion for ext. of time to file rehearing until March 30, 2006. [2022708-1] [03-2880, 03-2938] [2023773] in 03-2938, 03-2880

3/24/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee/Cross-Appellant William Weaver in 03-2880/03-2938, w/service 3/23/06. TO COURT [03-2880, 03-2938]

3/29/06 MOTION of aplnt/cross-appellee, William Weaver in 03-2880/2938, for extension of time to file petition for rehearing until 4/3/06. TO COURT w/service 3/29/06

4/3/06 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant/Cross-Appellee Michael Bowersox in 03-2880/2938, w/service 4/3/06. TO COURT [03-2880, 03-2938]

4/4/06 JUDGE ORDER: granting appellant motion for ext. of time to file rehearing to 4/3/06.

[2027616-1] [03-2880, 03-2938] [2028744] in 03-2880, 03-2938

4/7/06 Clerk letter sent notifying that parties have an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] in 03-2880/2938, and petition for Rehearing with petition for rehearing en banc filed by William Weaver [2028760-1] in 03-2880/2938. [03-2880, 03-2938] Response due by 4/17/06 in 03-2880, in 03-2938

4/14/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/28/06. [03-2880, 03-2938] [2034973] w/service 4/14/06

4/17/06 MOTION of aplnt/cross-appellee, Michael Bowersox in 03-2880/2938, for extension of time to file a response to petition for rehearing until 4/24/06. [03-2880, 03-2938] [2034974] w/service 4/17/06

4/19/06 ORDER filed: granting appellee motion extension of time to file response to petition. [2034973-1] [03-2880, 03-2938] [2035047] in 03-2880, 03-2938, granting appellant motion extension of time to file response to petition. [2034974-1] [03-2880, 03-2938] [2035047] in 03-2938, 03-2880 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938 Response to pet. for rehearing due on 4/28/06 in 03-2880, in 03-2938

4/27/06 MOTION of aplee/cross-appellant, William Weaver in 03-2880/2938, for extension of time to file a response to petition for rehearing until 5/3/06. [03-2880, 03-2938] [2039991] w/service 4/27/06

4/2806 RESPONSE to petition for REHEARING with petition for rehearing en banc filed by William Weaver [2028760-1] [2040546] in 03-2880/2938. Response filed by Michael Bowersox in 03-2880/2938. w/service 4/28/06. TO COURT [03-2880, 03-2938]

5/2/06 ORDER filed: granting appellee motion extension of time to file response to petition to 5/3/06. [2039991-1] [03-2880, 03-2938] [2039998] in 03-2880, 03-2938 Response to pet. for rehearing due on 5/3/06 in 03-2880, in 03-2938

5/3/06 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Michael Bowersox [2028766-1] [2040555] in 03-2880/2938. Response filed by William Weaver in 03-2880/2938. w/service 5/2/06. TO COURT [03-2880, 03-2938]

5/31/06 JUDGE ORDER: The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied. Chief Judge Loken, Judge Wollman, Judge Riley, Judge Colloton, and Judge Gruender would grant Michael Bowersox's petition for rehearing en banc. Judge Benton did not participate in the consideration or decision of this matter. [2028766-1] [2050489] [2028760-1] [03-2880,

03-2938] [2050489] in 03-2880, 03-2938 - Published Order.

6/22/06 MANDATE ISSUED [03-2880, 03-2938]

6/23/06 RECEIPT for Mandate. [03-2880, 03-2938] [2062404]

8/9/06 Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 1 box of Exh; . [03-2880, 03-2938]

9/11/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 8/29/06. Supreme Ct. Case No.: 06-313 [03-2880, 03-2938] [2090439]

10/17/06 U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on 10/4/06. Supreme Ct. Case No.: 06-7089 [03-2880, 03-2938] [2111948]

12/12/06 U.S. Supreme Court order: The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. [2111948-1] [2090439-1] in 03-2880, 03-2938. Order filed in the Supreme Court on 12/7/06 Sup. Ct. No. 06-313 [03-2880, 03-2938]

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI

No. 4:96-CV-2220 CAS

WILLIAM WEAVER, Petitioner,

v.

MICHAEL BOWERSOX, Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
11/12/1996	PETITION FOR WRIT OF HABEAS CORPUS by petitioner William Weaver (KLK) (Entered: 11/13/1996)
11/12/1996	MOTION by petitioner William Weaver for appointment of counsel (KLK) (Entered: 11/13/1996)
11/13/1996	LETTER to petitioner re: case filed (KLK) (Entered: 11/13/1996)
11/18/1996	RESPONSE by respondent Michael Bowersox to motion for appointment of counsel [2-1] (CQL) (Entered:11/21/1996)
11/27/1996	CASE MANAGEMENT ORDER by Honorable Charles A. Shaw: administrative (4) track,; Petitioner to file petition by 5/27/97 and any motion for evidentiary hearing and supporting documents by 5/27/97; Respondent shall file a response to amended petition/hearing by 7/12/97 and petitioner shall file his traverse/reply by

8/27/97 (cc: all counsel) (CQL) (Entered: 12/03/1996)

11/27/1996 ORDER by Honorable Charles A. Shaw granting motion for appointment of counsel [2-1] Philip M. Horwitz, Eric W. Butts are appointed as petitioners counsel: complete copy of file sent to appointed counsel. (cc: all counsel) (CQL) (Entered: 12/03/1996)

01/24/1997 ORDER GRANTING LEAVE TO PROCEED EX PARTE ON A SEALED RECORD REGARDING EXPERT AND INVESTIGATIVE ASSISSSTANCE (SEE ORDER) by Honorable Charles A. Shaw (cc: all counsel) (CQL) (Entered: 01/29/1997)

02/11/1997 EX-PARTE MOTION by petitioner William Weaver for order for interim payment of fees to appointed counsel (MRC) (Entered: 04/15/1997)

04/11/1997 ORDER by Honorable Charles A. Shaw - It Is Ordered that petitioner's motion that this court consider a request for interim payments of fees and costs is granted; and petitioner may file vouchers every 2 months with the Clerk of the Court seeing payment of fees and expenses. (granting motion for order for interim payment of fees of appointed counsel [8-1] (cc: all counsel) (MRC) (Entered: 04/15/1997)

04/11/1997 MEMORANDUM AND ORDER: by Honorable Charles A. Shaw - The court will allow counsel to obtain interim payment of fees and expenses...If counsel desires additional clarification concerning payments under the

CJA. counsel should address inquiries to the Clerk of the Court. SO ORDERED. (cc: all counsel) (MRC) (Entered: 04/15/1997)

05/20/1997 RETURN LETTER from Clerk to Petitioner re: req. for ext of time to file an amended petition (SET) (Entered: 05/21/1997)

05/22/1997 MOTION by petitioner William Weaver to extend time thru 6/27/97 to file his amended petition. (CQL) (Entered: 05/27/1997)

05/22/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time thru 6/27/97 to file his amended petition. [12-1] (cc: all counsel( )CQL) (Entered: 05/27/1997)

05/30/1997 CJA Form 30 (Attorney Payment Voucher) paid to Phillip Horwitz, in the amount of $6,079.5, and recorded on voucher number D44824 as to petitioner William Weaver (SET) (Entered: 06/02/1997)

06/27/1997 AMENDED PETITION FOR WRIT OF HABEAS CORPUS by petitioner William Weaver (CQL) (Entered: 05/10/1999)

06/27/1997 MOTION by petitioner William Weaver for evidentiary hearing on pltffs amended petition (CQL) (Entered: 07/01/1997)

06/27/1997 GENERIC SCHEDULING EVENT ; Dispositive Motion ddl satisfied (CQL) (Entered: 07/01/1997)

07/03/1997 CJA From 30 (Attorney Payment Voucher

Death Penalty) paid to Philip Horwitz, in the amount of $3,173.50, and recorded on voucher number D44824 (CQL) (Entered: 07/08/1997)

08/05/1997 CJA Form 30 (Attorney Payment Voucher) paid to Eric Butts, in the amount of $5,061.00, and recorded on voucher number 44838 as to petitioner William Weaver (SET) (Entered: 08/08/1997)

08/07/1997 MOTION by respondent Michael Bowersox to extend time to respond til 8/26/97 (FCE) (Entered: 08/14/1997)

08/11/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time to respond til 8/26/97 [0-1] (cc: all counsel) (FCE) (Entered: 08/14/1997)

08/28/1997 MOTION by respondent Michael Bowersox to extend time to answer (PGD) (Entered: 09/11/1997)

09/08/1997 RESPONSE to order show cause by respondent Michael Bowersox [5-2], [1-1] with exhibit A Attached. (CQL) (Entered: 09/09/1997)

09/08/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time to answer [19-1] (cc: all counsel) (PGD) (Entered: 09/12/1997)

09/11/1997 MOTION by respondent Michael Bowersox for leave to file supplemental response to order to show cause why a writ of habeas corpus should not be granted (MRC) (Entered: 09/16/1997)

09/11/1997 RULED DOCUMENT by Honorable Charles A. Shaw - LEAVE GRANTED (CAS). granting respondent's motion for leave to file supplemental response to order to show cause why a writ of habeas corpus should not be granted [20-1] (cc: all counsel) (MRC) (Entered: 09/16/1997)

09/11/1997 SUPPLEMENTAL by respondent Michael Bowersox re response to order to show cause why a writ of habeas corpus should not be granted [18-1] (MRC) (Entered: 09/16/1997)

09/22/1997 MEMORANDUM (Respondent's Exhibits A-E in 9 folders to Show cause response) by respondent Michael Bowersox re: [21-1], re: response [18-1] (CQL) (Entered: 09/23/1997)

10/14/1997 MOTION by petitioner William Weaver to extend time to file travers (GLF) (Entered: 10/17/1997)

10/14/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time to file traverse [23-1] cc: all counsel) (GLF) (Entered: 10/17/1997)

11/03/1997 CJA Form 30 (Attorney Payment Voucher) paid to Philip Horwitz, in the amount of $1,795.50, and recorded on voucher number D44824 as to petitioner William Weaver (CQL) (Entered: 11/07/1997)

11/18/1997 MOTION by petitioner William Weaver to extend 45 days to file travers (SET) (Entered: 11/25/1997)

11/18/1997 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend 45 days to file traverse [25-1] (cc: all counsel) (SET) (Entered: 11/25/1997)

01/05/1998 TRAVERSE by petitioner William Weaver to [18-1] (GLF) (Entered: 01/07/1998)

02/27/1998 LETTER from petitioner William Weaver's sister re: review file (SET) (Entered: 02/27/1998)

03/13/1998 ORDER NUNC PRO TUNC by Honorable Charles A. Shaw denying motion for evidentiary hearing: Further Ordered that order dated 3/12/98 in cause #4:96CV774 CAS is vacated, and the Clerk of the Court is hereby ordered to remove the order from the Court file. [14-1] (cc: all counsel) (CQL) (Entered: 03/18/1998)

02/10/1999 GENERIC SCHEDULING EVENT ; Response to Court ddl satisfied (CQL) (Entered: 02/10/1999)

08/09/1999 MEMORANDUM AND ORDER: by Honorable Charles A. Shaw granting habeas corpus motion AMENDED PETITION FOR WRIT OF HABEAS CORPUS [15-1], granting habeas corpus motion [15-2], terminating habeas corpus motion PETITION FOR WRIT OF HABEAS CORPUS [1-1] IT IS FURTHER ORDERED that William Weaver's request for evidentiary hearing is DENIED as moot. IT IS FURTHER ORDERED that the Judgement and Sentencing in the State of Missouri v. Weaver Cause No. 565118B is Vacated. If the State of

Missouri elects to retry William Weaver it must file a notice of intention to do so prior to September 27, 1999. (Cc: all counsel) (JWJ) (Entered: 08/09/1999)

08/09/1999 WRIT OF HABEAS CORPUS: by Honorable Charles A. Shaw IT IS HEREBY ORDERED, ADJUDGED and DECREED that William Weaver is GRANTED this Writ of Habeas Corpus. IT IS FURTHER ORDERED, ADJUDGED and DECREED that if the State of Missouri elects to retry William Weaver, it shall file a motion of its intention to do so prior to September 27, 1999. (Three (3) certified copies forwarded to thr U.S. Marshal Service) terminating case (cc: all counsel) (JWJ) (Entered: 08/09/1999)

09/07/1999 NOTICE OF APPEAL filed by respondent Michael Bowersox re: the District Court decision ; [30-2] fee: $105.00 (CQL) (Entered: 09/08/1999)

09/07/1999 RECEIPT # S99-9071 in the amount of $ 105.00 for Appeal/Docket fee (CQL) (Entered: 09/08/1999)

09/10/1999 DELIVERED TO USCA - 1 Civil Appeal Cover Sheet. 2 Certified Copies of Notice of Appeal filed by Respondent, 2 Certified Copies of Clerk's Docket entries and 2 copies of ORDER RE WRIT OF HABEAS CORPUS/MEMO/ORDER (CAS) file 8/9/99. Copy of NOA to Judge Shaw. cc: NOA, Clerk's docket entries and USCA letter to parties. (FCE) (Entered: 09/10/1999)

09/21/1999 MOTION by respondent Michael Bowersox to stay orders and judgement with: Exhibit A attached. (CQL) (Entered: 09/22/1999)

09/23/1999 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to stay orders and judgment [33-1] (cc: all counsel) (JWJ) (Entered: 09/23/1999)

09/23/1999 NOTIFICATION AND BRIEFING SCHEDULE (USCA) FILED USCA #: 99-3462 Mthd of Appndx Prep Due: 10/4/99 Transcript Due: n/a Designations Due: 10/4/99&10/13/99 Briefs Due: 11/2/99&12/2/99&12/16/99 (MRC) (Entered: 09/27/1999)

09/23/1999 LETTER from USCA: to previous counsel, Eric Butts USCA # 99-3462 re: appointment to represent appellant as co-counsel (MRC) (Entered: 09/27/1999)

09/23/1999 LETTER from USCA: to previous counsel for petitioner/appellant, Phillip Horwitz USCA # 99-3462 re: appointment as counsel for party under death penalty (MRC) Modified on 09/27/1999 (Entered: 09/27/1999)

09/24/1999 RESPONSE to Court Order Of August 9, 1999 by respondent Michael Bowersox to [29-1] (MRC) (Entered: 09/27/1999)

04/24/2000 CJA Form 30 (Attorney Payment Voucher) paid to Phillip Horwitz, in the amount of $12,337.50, and recorded on voucher number 53268 as to petitioner William Weaver (JWJ) (Entered: 05/10/2000)

02/26/2001 Opinion from USCA on USCA number 99-3462 Opinion of USCA: reverse/remand (CQL) (Entered: 02/28/2001)

03/14/2001 ORDER FROM USCA copy filed USCA number: 99-3462 Appellants motion for rehearing has been considered by the court and is granted. Appellant may have to 4/27/01 to file the petition for rehearing. (JWJ) (Entered: 03/19/2001)

05/09/2001 LETTER from USCA to MO Atty Gen Office re: USCA # 99-3462 requesting 21 copies of their response to petitioner's appeal by 5/18/01. (FCE) (Entered: 05/10/2001)

05/31/2001 ORDER FROM USCA copy filed USCA number: 99-3462 The appellant's motion for an extension of time within which to respond to appellee's petition for rehearing is granted to 6/8/01. No further extensions will be granted. (FCE) (Entered: 06/01/2001)

06/29/2001 ORDER FROM USCA copy filed USCA number: 99-3462 the petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied (JWJ) (Entered: 07-03-2001)

07/13/2001 MANDATE W/OPINION ATTACHED from (USCA) reversing and remanding the Decision of the District Court [Appeal [31-1]] USCA number: 99-3462 (cc: all counsel) (JWJ) (Entered: 07/16/2001)

05/07/2003 MEMORANDUM AND ORDER: by

Honorable Charles A. Shaw - IT IS HEREBY ORDERED that petitioner Weaver's first amended petition for writ of habeas corpus is GRANTED as to the sentence of death only, based on portions of claim two ..., and DENIED in all other respects. Weaver's death penalty is vacated, and he must either be sentenced to life in prison without the possibility of parole or must be given a new trial on the state's request for the death penalty. IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability. An appropriate judgement will accompany this memorandum and order. granting habeas corpus motion AMENDED PETITION FOR WRIT OF HABEAS CORPUS [15-1] (cc: all counsel) (MRC) (Entered: 05/08/2003)

05/07/2003 JUDGMENT: by Honorable Charles A. Shaw - IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner William Weaver's first amended petition for writ of habeas corpus pursuant to 28 USC 2254 is GRANTED as to the sentence of death, based on portions of claim two, and DENIED on all other claims. IT IS FURTHER ORDERED that petitioner has not made a substantial showing of the denial of a constitutional right.....therefore this Court will not issue a certificate of appealability. for petitioner William Weaver against respondent Michael Bowersox terminating case (cc: all counsel) (MRC) (Entered: 05/08/2003)

05/08/2003 SUPPLEMENTAL Response to Order to Show Cause Why A Writ of Habeas Corpus Should

Not Be Granted with Exhibit H-Affidavit of Helen Bode attached by respondent Michael Bowersox re response [18-1] (MRC) (Entered: 05/09/2003)

05/21/2003 MOTION by petitioner William Weaver to alter, amend, or to set aside judgment under Rule 59(e). (KXS) (Entered: 05/21/2003)

06/03/2003 MOTION by respondent Michael Bowersox to extend time in which to file suggestions in opposition to the motion to alter or amend judgment up to and including 6/12/03 (JWJ) (Entered: 06/04/2003)

06/03/2003 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time in which to file suggestions in opposition to the motion to alter or amend judgment up to and including 6/12/03 [50-1] (cc: all counsel) (JWJ) (Entered: 06/04/2003)

06/12/2003 MOTION by respondent Michael Bowersox to extend time in which to file suggestions in opposition to motion to alter or amend judgment up to and including June 19, 2003 (KXS) (Entered: 06/16/2003)

06/16/2003 RULED DOCUMENT by Honorable Charles A. Shaw granting motion to extend time in which to file suggestions in opposition to motion to alter or amend judgment up to and including June 19, 2003 [52-1] GRANTED (cc: all counsel) (KXS) (Entered: 06/16/2003)

06/18/2003 RESPONSE by respondent Michael Bowersox

to motion to alter [49-1], to motion amend [49-2], to motion to set aside judgment [49-3] (JWJ) (Entered: 06/20/2003)

07/14/2003 MEMORANDUM AND ORDER: by Honorable Charles A. Shaw - IT IS HEREBY ORDERED that petitioner's motion to alter, amend or set aside judgment under Rule 59(e) is granted in part and denied in part; said motion is granted to the extent the Court will issued a certificate of appealability as to Claims 2.B and 2.C of the first amended petition for writ of habeas corpus and is denied in all other respects. IT IS FURTHER ORDERED that an amended judgment will accompany this memorandum and order, granting in part and denying in part morion to alter [49-1], granting in part and denying in part motion amend [49-2], granting and denying in part motion to set aside judgment [49-3] (cc: all counsel) (MRC) (Entered: 07/15/2003)

07/14/2003 AMENDED JUDGMENT: by Honorable Charles A. Shaw - IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner William Weaver's first amended petition for writ of habeas corpus pursuant to 28 USC 2254 is granted as to the sentence of death, based on portions of claim two and denied on all other claims. IT IS FURTHER ORDERED that petitioner established that this Court's resolution of Claims 2.B and 2.C is debatable among jurists of reason and therefore the Court will issue a certificate of appealability on Claims 2.B and 2.C. IT IS FURTHER ORDERED that with respect to the remaining claims, petitioner has

not made a substantial showing of the denial of a constitutional right.....and therefore this Court will not issue a certificate of appealability on those claims.(cc: all counsel) (MRC) (Entered: 07/15/2003)

07/21/2003 NOTICE OF APPEAL filed by respondent Michael Bowersox re: the District Court decision ; [47-2], [46-1], [56-1], [55-1] fee $ 105.00 paid (KXS) (Entered: 07/22/2003)

07/21/2003 RECEIPT # S2003-009484 in the amount of $ 105.00 for appeal (KXS) (Entered: 07/22/2003)

07/23/2003 DELIVERED TO USCA - 1 Civil Appeal Cover Sheet. 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries, Memo & Order (Hon. CAS) filed on 5/7/03, judgment (Hon. CAS) filed on 5/7/03, Memo & Order (Hon. CAS) filed on 7/14/03 and Amended judgment (Hon. CAS) filed on 7/14/03 re: 1st Amended petition for Writ of Habeas Corpus 28 USC 2254 is GRANTED and Non-issuance of Certificate of Appealability. cc: NOA to Hon. CAS. cc: NOA and Clerk's docket entries to parties. (CF) (Entered: 07/23/2003)

07/23/2003 Transmittal Acknowledgment from USCA I, II file volumes, transcript volumes (JWJ) (Entered: 07/24/2003)

07/24/2003 FILE RETURNED # of volumes; 2 re appeal [57-1] (KXS) (entered: 07/28/2003)

07/25/2003 NOTIFICATION AND BRIEFING SCHEDULE (USCA) FILED USCA #. 03-2880

Mthd of Appndx Prep Due: 10 days from today Transcript Due: N/A Designations Due: 10 days from today Briefs Due: aplnt 9/2/03; aplee 10/2/03; reply 10/16/03. (KXS) (Entered: 07/28/2003)

07/30/2003 NOTICE OF APPEAL filed by petitioner William Weaver re: the District Court decision; [56-1], [55-1], [47-2], [46-1] fee S IFP Status (MRC) (Entered: 07/31/2003)

07/31/2003 REMARK - Petitioner's notice of appeal, court file and docket entries forwarded to OSU for processing of appeal. (MRC) (Entered: 07/31/2003)

08/01/2003 DELIVERED TO USCA - 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries, Judgment (Hon. CAS) filed on 5/7/03 GRANTED 28 USC 2254, Memo & Order (Hon. CAS) filed on 7/14/03 and Amended Judgment (Hon. CAS) filed on 7/14/03 Non-issuance of Certificate of Appealability. Cc: NOA to CAS. cc: NOA and Clerk's docket entries to parties. (CF) (Entered: 08/01/2003)

08/01/2003 Transmittal Acknowledgment from USCA 2 file volumes, none transcript volumes USCA number: 99-3462 (JWJ) (Entered: 08/04/2003)

08/01/2003 ENTIRE FILE SENT TO (USCA) - # of Volumes: 2 (KXS) (Entered: 08/06/2003)

08/05/2003 FILE RETURNED # of volumes; 2 re appeal [62-1], re appeal [57-1] (counsel appointed)

(KXS) (Entered: 08/06/2003)

03/16/2005 Appeal Transmittal re [62] Notice of Appeal, [57] Notice of Appeal: The following has been forwarded to USCA: transcripts E01 through E09(LGK.) (Entered: 03/17/2005)

03/17/2005 Appeal Remark - transcript folders #E01- E09 received by USCA(KXS,) (Entered: 03/18/2005)

02/16/2006 OPINION from USCA re [57] Notice of Appeal, [62] Notice of Appeal: USCA Appeal #: 03-2880-2938 affirmed (KXS,) (Entered: 03/01/2006)

02/17/2006 OPINION from USCA re [57] Notice of Appeal, [62] Notice of Appeal: USCA Appeal #: 03-2880-2938 affirmed (KXS,) (Entered: 02/17/2006)

02/17/2006 ORDER RECEIPT: (see receipt) Fri Feb 17 10:01:17 CST 2006 (KXS,) (Entered: 02/17/2006)

03/01/2006 ORDER RECEIPT: (see receipt) Wed Mar 1 11:36:42 CST 2006 (KXS,) (Entered: 03/01/2006)

05/31/2006 ORDER of USCA USCA Appeal #. 03-2880/2938 Petitions for rehearing en banc are denied. Petitions for rehearing by panel are also denied. Chief Judge Loken and Judges Wollman, Riley, Colloton, and Gruender would grant petitioner for rehearing en banc. (KXS,) (Entered: 06/01/2006)

06/22/2006 MANDATE of USCA as to [57] Notice of Appeal filed by Michael Bowersox., [62] Notice of Appeal filed by William Weaver. Decision of USCA: Affirmed USCA #.03-2880/2938(KXS.) (Entered: 03/23/2006)

06/22/2006 OPINION from USCA re [57] Notice of Appeal. [62] Notice of Appeal: USCA Appeal #: 03-2880/2938 Affirmed (KXS,) (Entered: 06/23/2006)

08/11/2006 Appeal Remark USCA Appeal #. 03/2880 1 box exhibits returned to USDC from USCA(KXS,) (Entered: 08/14/2006)

09/19/2006 LETTER from USCA regarding writ of certiorari filed with the U.S. Supreme Court (MRC,) (Entered: 09/20/2006)

11/27/2006 ORDER of USCA Regarding: The petition for writ of certiorari being filed USCA Appeal #:06-7089 (JWJ,) (Entered: 11/29/2006)

Excerpt from Mr. Weaver's brief on consolidated appeal to the Missouri Supreme Court, pages 59 to 69. The entire brief was submitted on September 11, 1997 to district court as Respondent's Exhibit E.

In the
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
Respondent,	)	
	)	
vs.	)	No. 71051
	)	
WILLIAM WEAVER,	)	
Appellant.	)	

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

* * *

[59] **IV. WESTFALL'S IMPROPER ARGUMENTS**

Throughout guilt and penalty phase arguments, Westfall urged the jury to convict and impose death because, as the elected prosecuting attorney, he would not have charged Mr. Weaver and sought death unless he was guilty and deserved that punishment. During guilt and penalty phases, Westfall argued defense counsel had suborned perjury and fabricated the misidentification defense. Westfall made arguments that appealed to the jurors' personal fears, represented that he could have presented victim impact evidence, and suggested he had special knowledge of matters outside the evidence. Westfall's arguments deprived Mr. Weaver of his Federal and State Constitutional rights to due process and freedom from cruel and unusual punishment. Additionally, counsel failed to object to some of Westfall's improper arguments, and thereby, deprived Mr. Weaver of his right to effective assistance of counsel

guaranteed under the Federal and State Constitutions. Finally, Westfall's arguments also facially constituted prosecutorial misconduct.

This Court has recognized that "[i]t is a fundamental concept of the criminal law that an accused. . . . is entitled to a fair trial, and so it is the duty of the trial court, and of prosecuting counsel as well, to see that he gets one, and there must be no conduct by argument or otherwise, the effect of which is to inflame the prejudices or excite the passions of the jury against him." State v. Tiedt, 206 S.W.2d 524, 526 (Mo. banc 1947). See also, State v. Storey, No. 74425, slip op. at 25 (Mo. banc Jun. 20, 1995) (prosecutor's duty is to "serve justice, not just win the case"). Prosecutors are prohibited from injecting into the jurors' minds "any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds." Tiedt, 206 S.W.2d at 527. To be entitled to plain error relief under Rules 29.12 and 30.20, a defendant must "go beyond a mere showing of demonstrable prejudice to show manifest [60] prejudice affecting his substantial rights." State v. Hornbuckle, 769 S.W.2d 89, 92-93 (Mo. banc 1989).

This Court's review of the motion court's ruling is limited to determining whether it clearly erred. State v. White, 798 S.W.2d 694, 697 (Mo. banc 1990). A defendant's right to effective assistance of counsel is violated if counsel failed to exercise the customary skill and diligence a reasonably competent attorney would have exercised under similar circumstances and he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1984). The first amended motion alleged counsel was ineffective for failing to object to Westfall's guilt and penalty arguments which independently constituted prosecutorial misconduct because he: (1) represented he only brought charges and sought the death penalty in cases warranting such treatment; (2) attacked defense

counsel's integrity; (3) appealed to the jurors' personal fears; and (4) suggested he had special knowledge of matters outside the evidence (R.L.F. 160, 164-65). The motion court rejected these claims concluding that all of Westfall's arguments were proper (R.L.F. 1035-36).

This Court has recognized that a prosecutor's statement of personal opinion during argument transforms the prosecutor into an unsworn witness. State v. Storey, slip op. at 25-26 (Mo. banc Jun. 20, 1995). When a prosecutor makes such arguments, it is prejudicial because the jury properly believes the prosecutor has a duty to serve justice and not to merely win the case. Id. at 26. Westfall engaged in the same type of conduct as the prosecutor in Storey and reversal is required here as well.

A. Position As The Elected Prosecutor

The decision to impose death must be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 358 (1977). In Newlon v. Armontrout, 693 F.Supp. 799 (W.D. Mo. 1988), aff'd., Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), the defendant's death sentence was vacated because Westfall made the same improper arguments there that he again made here (R. Tr. 115). Representations that the prosecutor's office only seeks the death penalty in cases deserving the death penalty are irrelevant and prejudicial. Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985). Such argument is prejudicial because it is similar to argument that "we only [61] prosecute the guilty." Id. Argument that the prosecutor's office only prosecutes the guilty cannot be cured even with an instruction to disregard. State v. Evans, 820 S.W.2d 545, 547-548 (Mo. App., E.D. 1991).

During guilt phase rebuttal, Westfall argued:

Come on. All these coincidences, you can't believe it. It's nonsense. If you don't believe the State's case here, you twelve people would never convict anybody.

MS. BLACK: Objection, Your Honor. That is totally improper to give that kind of threat to the jury.

THE COURT: Sustained.

MS. BLACK: I ask the jury to be instructed to disregard it.

THE COURT: The last comment of Mr. Westfall will be stricken. The jury is ordered to disregard that statement.

(Tr. 1710) (emphasis added).

Westfall's initial penalty argument included:

I can't emphasize too much don't second-guess your verdict in that regard. It was the right verdict and you know it and you're comfortable with it. Now, the only decision is should his life be spared. And I say to you: Why should it be? When you were selected as jurors, you all said, yes, in the right case I can give the death penalty. And one or two of you even said you would favor the death penalty in the right case. Well, if this isn't it, what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it

in? So if you were being honest to me when you said that, then that has to be the case.

MS. BLACK: Objection, Your Honor. That calls for improper argument. May we approach the bench, please?

MR. WESTFALL: Judge, would you save my time? (Counsel approached the bench and the following proceedings were had:)

MS. BLACK: I object to the State using this somewhat threatening statement to the jury that if they don't come back with death in this particular case, then there's no other case that they could come back with a death for and would come back with death for. I think it's improper argument to this jury. It is intended to impose fear and intimidation on this jury into arriving at a verdict of death. And I ask this jury - - the judge to sustain the objection and instruct the jury to disregard his last comment and to admonish counsel against making those kinds of comments to the jury.

MR. WESTFALL: Judge, I'm simply speaking hypothetically that if this isn't the case that calls for a death penalty, what type of case would?

THE COURT: I'll overruled the objection.

(The proceedings returned to open court).

[62] MR. WESTFALL: If this isn't a

> case that calls for the death penalty. I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said you would prefer it, that you would favor it in the right case. This is the right case.

(Tr. 1761-62) (emphasis added).

* * * *

> "I mean if this isn't the case for the death penalty, then there's no case you'll do it."

(Tr. 1765) (emphasis added).

Westfall's penalty rebuttal argument continued:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

(Tr. 1778) (emphasis added). The trial court again sustained an objection and directed the jury to disregard the argument (Tr. 1778).

Westfall's penalty rebuttal continued:

> It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law

> enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

(Tr. 1781-82) (emphasis added). Once again, an objection was sustained and the jury instructed to disregard (Tr. 1782). Finally, Westfall's rebuttal argument continued:

> MR. WESTFALL: Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do.
>
> MS. BLACK: Objection, Your Honor. This is improper closing, to inflame and prejudice this jury by using that example in that particular movie.

[63] MR. WESTFALL: Judge, it's just an analogy.

THE COURT: Overruled.

(Tr. 1782-83) (emphasis added).

In Newlon, Westfall repeatedly made these same arguments, without objection, and the death sentence was still vacated. Newlon, 885 F.2d 1339-40, 1342. The prejudice to Mr. Weaver was not cured even when objections were sustained and instructions to disregard were given. See State v. Evans, supra. Westfall's conduct in Mr. Weaver's case is especially egregious because when he tried Mr. Weaver's case he knew that Newlon's sentence had been vacated based on these same improper arguments (R. Tr. 154-56; Ex. 8 at 54-55). It is not surprising that Westfall would display such a cavalier disregard for this State's judiciary, especially in light of his conduct that gave rise to this Court's decision in In the Matter of Westfall, 808 S.W.2d 829 (Mo. banc 1991). In Newlon, the District Court declined to consider hearsay testimony that Westfall had made statements at a tavern, in the presence of his assistants, that he intended to "'let it all hang out'" during penalty phase argument. Newlon, 693 F.Supp. at 808 n.4. However, the District Court, in reviewing Westfall's argument, concluded "he did, in fact, 'let it all hang out.'" Id. This Court should similarly find Westfall again improperly "let it all hang out" in his guilt and penalty arguments.

In Storey, this Court found the prosecutor's argument that the homicide was one of the most brutal killings in St. Charles County's history was improper. Storey, slip op. at 24-25. That argument was improper because there was no evidence about the brutality of other murders in St. Charles County and constituted unsworn testimony by the prosecutor. Id. Here, Westfall made a similar argument that was even

more egregious than the Storey argument. Westfall's opinion argument was worse because he told the jury that Mr. Weaver's case when it was compared to all other homicides, not just those in St. Louis County, warranted death. Cf. Antwine v. Delo, 54 F.3d 1357, 1360-64 (8th Cir. 1995) (no evidence in record to support prosecutor's argument death penalty would be imposed "instantaneously" so as to be quick, painless, and humane). There was no evidence of all other homicides demonstrating why Mr. Weaver's case, above all others, required death.

[64]**B. Attacks On Defense Counsel**

Prosecutorial argument implying defense counsel suborned perjury and fabricated the defense is patently improper. State v. Harris, 662 S.W.2d 276, 277 (Mo. App., E.D. 1983). See also, State v. Burnfin, 771 S.W.2d 908, 912-13 (Mo. App., W.D. 1989) (argument defense counsel spent two days attempting to hide the truth improper). A much repeated theme of Westfall's argument was counsel suborned perjury and fabricated Mr. Weaver's defense.

> During initial guilt phase, without objection, Westfall argued:
>
> He and Daryl Shurn went there to kill Charles Taylor and they succeeded. It didn't go the way they wanted it to go or he wouldn't be sitting here right now, but they succeeded. Charles Taylor is dead and he's been in the grave a little over a year now. And now, of course, Mr. Weaver is here lying to you and telling you that he didn't do it and wanting you to believe that and hoping through the assistance of Ms. Black - - who is just about as capable of a defense attorney as you're going to find in these cases - - that enough confusion, enough

> smokescreens, enough whatever has been created to put in your mind some reasonable doubt as to his guilt. But it's murder First Degree or it's nothing. The other charge, Murder Second Degree, that's an option under the law, but it's not there under the facts and you know it, so don't do it.

(Tr. 1645) (emphasis added). Westfall's argument, this time over objection, continued:

> You know, as we went through the trial, it was sort of like the Doris Black show. I'm the Prosecutor. I put on the witnesses. I elicit from them or ask the questions I need to have answered in order to prove what I think is a submissible case against Mr. Weaver, a sufficient case. Then Doris Black, of course, gets up with every witness and yells and hollers and in some cases intimated or mocked, humiliated, had one of them crying, Jean Henson, had Chris Coslick a nervous wreck. These are just ordinary people. They happened to be in the wrong place at the wrong time; and because of that, they were called as witnesses in this case. You think they enjoy coming to a trial where a man is on trial for cold-blooded murder with the death penalty in the picture? You think they wanted to come into this courtroom last week? You know better than that. They came because they saw what they saw and they did the best they could. They were subjected to what I would call abuse, but that's your decision whether you think it would be unfair treatment.

MS. BLACK: Objection. The Court would have reprimanded me if I was abusing the witness. The Court had the direct authority to direct me not to question them a certain way.

THE COURT: This is argument, Ms. Black. I'll overrule the objection.

[65] MR. WESTFALL: But as the case unraveled. I'm sitting there listening to all this and I've got my back to you people, and I don't know what impact the things elicited by Ms. Black may have had on you. I don't know whether you think these little mole hills that Ms. Black talked about are now mountains in your mind or if they are still mole hills. I don't know whether the smokescreen she's creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see it's nothing more than a smokescreen and you're waiting to get to the jury room to render a verdict of guilty.

But at this point, you've heard all the evidence you're going to hear. But that's all you heard for four or five days was a harangue to try to create confusion out of nothing, to try to get a police officer to make one little mistake which then makes him a liar, one inconsistency, whatever, and they are liars; they are perjurers. Just create whatever smokescreens you have. So the last day or two, I've been concerned what impact is this having on the jury?

Well, last night when I'm trying to decide exactly what I'm going to say to you and

I cleared all the smoke away and all the harangue and all the noise, you're left with nothing more than the facts. I have nothing to be afraid of unless you people heard something different than I heard. The only idiocy that you heard in this trial was Mr. Weaver's defense. If you want to hear about a cock and bull story, what he was doing out there on July the 6th with Leslie Cunningham is nonsense. If that were the State's case, I'd say you shouldn't even deliberate. Let him go in five seconds; because that wouldn't convince anybody of anything, his story is so ridiculous. And we'll get to that.

(Tr. 1647-50) (emphasis added). The same arguments continued as follows:

Joe Collins told you he took about 8 or 9 photos, some of which were introduced in evidence, some weren't; but they were all made available to Ms. Black and myself. The pertinent ones - - there's the tennis shoe, State's Exhibit 16, on the hill. You can't see the fence and trees, but you know it's there. He's not lying about where he took it. And she's got the nerve to show you these photographs that she said look like they were taken at nighttime. I guess you just have to believe with somebody that bold that she's going to suggest that was taken at nighttime as opposed to bad exposure, if you want to by that boldness - -

MS. BLACK: Your Honor, I want to object to the term "bold". We're supposed to be professional here and that connotation, as the Court knows, is an obscene connotation.

THE COURT: Overruled.

(Tr. 1658) (emphasis added). The attack on counsel continued:

> That proves it was a plant, yeah. To whom it would prove it, I don't know, except to Doris Black, assuming you believe she's convinced of it. These are just a sequence of police photographs trying to show you with moving things around what was on the floorboard of that car.

[66](Tr. 1664) (emphasis added).

* * * *

> Now, compare the State's case. Before I even get to this case, do you know what a remarkable series of coincidences you have to have here for William Weaver to be innocent and yet to find himself in this jam? He's out there to meet his lover. And by the way, I'm not even convinced the girl was having an affair with him. I think they found a young girl and she may be willing to come in here and be the hero this week. Ms. Black talked about her being so embarrassed, how difficult it was for her to testify. She came back the next day and sat in the first row and for three or four more days. She's the star of the show. She is the heroin [sic].

(Tr. 1665) (emphasis added). Next, Westfall argued:

> If they wanted to frame William Weaver, why didn't they take his tennis shoes, if he had

> some, and stick it in the mud and come and back and give you a picture of Weaver's? Of course, if they did that, Doris Black would say it's a frame. If they came in and said there was an oral confession, she would say it was beaten out of him. It was a frame. Why didn't they hand him a glass of water at the police station, let him drink it and, when he's finished with it, take a fingerprint off of the glass and come in and say they got it off the windshield of the Oldsmobile. If they wanted to frame him, they could do that. Of course, then she'd say it's a frame. She planted the word "frame".

(Tr. 1669-70) (emphasis added).

* * * *

> Nothing blossomed. Nothing developed. All her haranguing, all her yelling, when you wipe the smoke away, you've got nothing left except the facts.

(Tr. 1670) (emphasis added).

* * * *

> There was no love affair, at least not that morning, and perhaps not at all. He wasn't there to meet Leslie Cunningham and she wasn't endorsed until about five days before this trial, even though it was scheduled three months ago, has been pending for a year. It's all a big lie.

(Tr. 1671) (emphasis added).

During initial penalty phase Westfall continued:

> The State's case - - the evidence in this case once you threw out all the smokescreens and evaluated his perjury that his people put on, his guilt was obvious and you arrived at that verdict. Don't second-guess your verdict. I mean I think you should be offended by the fact that he's still maintaining his innocence. It's obvious [67] why he's doing it. He wants you to second-guess your verdict and spare his life on that basis alone.

(Tr. 1757) (emphasis added).

All of these arguments portrayed defense counsel as having suborned perjury and fabricated Mr. Weaver's defense. The arguments here prejudicially impugned defense counsel's integrity. See Harris and Burnfin, supra.

C. Other Improper Arguments

Besides the two noted areas of improper argument, Westfall engaged in an assortment of other forms of improper argument. These assorted arguments, continued to remove reason from the sentencing decision.

Westfall was allowed to argue over objection, during initial penalty phase, matters lacking evidentiary support. In particular, Westfall argued that if Mr. Weaver had not run out of bullets, then he would have shot police officer Crain (Tr. 1762-64). Even though counsel objected there was no evidence to support the argument, Westfall told the jury that if witness Jean Henson had been jogging a short while later, then Mr. Weaver would have shot her (Tr. 1763).

Also, Westfall argued outside the evidence that the death penalty is a deterrent (Tr. 1778-79). In fact a study of Missouri homicides found that there was a lower homicide rate during periods when the death penalty was declared unconstitutional and that for periods when the death penalty was permitted the number of homicides increased as the number of executions increased (R. Tr. 60-61 Ex. 4 offer of proof. L.F. 38-58; Supp. L.F. 25-45). Westfall made this argument even though trial counsel filed a motion to preclude it and attached a copy of the study that found in Missouri the death penalty does not act as a deterrent to homicide (L.F. 38-58; Supp. L.F. 25-45).

In an effort to intentionally mislead lead the jury during initial penalty phase, Westfall argued:

> But give the other message to the Gardiners of the world. He's chasing a - - it's a shooting case. His life was on the line. You want to tell him that for this kind of crime the guy goes to prison? <u>There are other crimes the life without parole is appropriate for that are less serious than murder</u>. I mean there are a number of crimes where somebody should spend the rest of their life - -
>
> [68] MS. BLACK: Your Honor. there is no other crime that life without parole would apply to. It is only Murder First Degree.
>
> MR. WESTFALL: <u>Judge, I'm giving my opinion, not stating what the law is</u>.
>
> MS. BLACK: It's a misstatement - -
>
> THE COURT: Sustained.

> MS. BLACK: I ask the jury be instructed to disregard that statement.
>
> THE COURT: The jury will disregard the statement stating there are other crimes for which life without parole is the punishment. You may proceed.

(Tr. 1766-67) (emphasis added). Courts having recognized that even when objections are sustained to especially improper prosecutorial arguments, reversal is still warranted. See Robinson v. Maynard, 829 F.2d 1501, 1511-12 (10th Cir. 1987) (discussing decision of state court in Scott v. State, 649 F.2d 560 (Okla. Cr. 1982)). Westfall's argument that constituted his "opinion" and not the law coupled with all his other improper arguments, likewise, requires reversal.

Westfall also argued he could have presented matters outside the evidence. In particular, Westfall argued, without objection, that he could have presented victim impact evidence through Mr. Taylor's wife, relatives, and friends (Tr. 1758).

The penalty phase argument, without objection, advanced imposing death in order to further the "War on Drugs" and described the jurors' need to protect the community through voting for death (Tr. 1759, 1768, 1776-77, 1779, 1781). Recent decisions have condemned closing arguments intended to appeal to jurors' passions and prejudices, urging them to convict to further The War on Drugs. See United States v. Johnson, 968 F.2d 768 (8th cir. 1992); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991). In Solivan, the Sixth Circuit reasoned that the amelioration of societal woes surrounding the drug problem is too heavy a burden for an individual defendant to bear. Solivan, 937 F.2d at 1153. This Court should find that, by injecting The War on Drugs, Westfall appealed to the jurors' passions and prejudices and Mr. Weaver's death

sentence resulted. Cf. Newlon v. Armontrout, 885 F.2d at 1335-38 (injection of improper considerations required reversal of death sentence). Moreover, argument urging the jury to convict a defendant in order to protect community values, preserve civil order, or deter future lawbreaking is impermissible. United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984).

[69] All of the arguments above were as egregious as the arguments in Newlon and Storey. The trial court erred in overruling defense counsel's objections. Further, as to those arguments for which there was no objection, they resulted in manifest injustice. In the alternative, reasonably competent counsel under similar circumstances would have objected to these improper arguments for which there was no objection and Mr. Weaver was prejudiced because they produced a conviction and sentence based on caprice and emotion. Even when an instruction to disregard was given, it was inadequate to cure Westfall's improper arguments. finally, Westfall's arguments independently constituted prosecutorial misconduct. This Court should reverse Mr. Weaver's conviction or at a minimum order a new penalty phase.

540

5

FILED
JAN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-313
(Capital Case)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
ANDREA K. SPILLARS
Chief Counsel, Public Safety Division
STEPHEN D. HAWKE*
ALANA M. BARRAGÁN-SCOTT
HEIDI C. DOERHOFF
RONALD S. RIBAUDO
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102-0899
Phone: (573) 751-3321 Fax: (573) 751-3825

Counsel of Record

QUESTION PRESENTED
(Capital Case)

Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 17

ARGUMENT 19

Weaver is not entitled to federal habeas relief because the Missouri Supreme court's decision was not contrary to nor unreasonably applied clearly established federal law. 19

A. *Donnelly v. DeChristoforo*, *Darden v. Wainwright*, and *Romano v. Oklahoma* supply the federal law framework for Weaver's due process claim. 20

B. The Missouri Supreme Court's decision was not "contrary to" *Donnelly*, *Darden*, or *Romano*. 22

C. The Missouri Supreme Court's decision was not an "unreasonable application" of *Donnelly*, *Darden*, or *Romano*. 23

D. The court of appeals' contrary analysis was wrong. 28

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995) 28

Atkins v. Virginia, 536 U.S. 304 (2002) 26

Batson v. Kentucky, 476 U.S. 79 (1986) 14

Bell v. Cone, 535 U.S. 685 (2002) 19, 20

Buchanan v. Angelone, 522 U.S. 269 (1998) 16, 29

Caldwell v. Mississippi, 472 U.S. 320 (1985) 15

Carey v. Musladin, 127 S. Ct. 649 (2006) 19

Copeland v. Washington,
232 F.3d 969 (8th Cir. 2000) 16

Darden v. Wainwright,
477 U.S. 168 (1986) 17, 18, 20-25, 28, 29

Donnelly v. DeChristoforo,
416 U.S. 637 (1974) 17, 18, 20-24, 26-30

Early v. Packer, 537 U.S. 3 (2003) 23

Gregg v. Georgia, 428 U.S. 153 (1976) 26

Harmelin v. Michigan, 501 U.S. 957 (1991) 16, 29

Jones v. United States, 527 U.S. 373 (1999) 16, 29

Lindh v. Murphy, 521 U.S. 320 (1997) 19

Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) ... 15, 28

Newlon v. Armontrout,
885 F.2d 1328 (8th Cir. 1989) 15, 22, 28, 30

Richardson v. Marsh, 481 U.S. 200 (1987) 25

Romano v. Oklahoma,
512 U.S. 1 (1994) 16-18, 20, 22-26, 28, 29

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999) 16

State v. Weaver, 912 S.W.2d 499 (Mo. 1995) 1, 13

Sublett v. Dormire, 217 F.3d 598 (8th Cir. 2000) 16

United States v. Johnson,
968 F.2d 768 (8th Cir. 1992) 16, 28

Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001) .. 1, 14

Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006) ... 1, 15

Weaver v. Bowersox, No. 4:96-CV-2220-CAS
(E.D. Mo. Aug. 9, 1999) 14

Weaver v. Bowersox, No. 4:96-CV-2220-CAS
(E.D. Mo. May 7, 2003) 15

Weaver v. Missouri, 519 U.S. 856 (1996) 14

Williams v. Taylor,
529 U.S. 362 (2000) 19, 20, 28

Yarborough v. Alvarado, 541 U.S. 652 (2004) 28

Zant v. Stephens, 462 U.S. 862 (1983) 15, 16, 29

Statutes

28 U.S.C. §1254(1) 2

28 U.S.C. §2254 ..... i, 2, 14-19, 22, 23, 28

Constitutional Provision

Fourteenth Amendment to the U.S. Constitution 2

No. 06-313
(Capital Case)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The February 14, 2006 decision of the United States Court of Appeals for the Eighth Circuit under review (Pet. App. A-2) is reported at 438 F.3d 832 (8th Cir. 2006) (as corrected on February 23, 2006). The district court's May 7, 2003 decision (Pet. App. A-23) is unreported. An earlier decision by the court of appeals (Pet. App. A-187) is reported at 241 F.3d 1024 (8th Cir. 2001). An earlier decision by the district court (Pet. App. A-203) is also unreported. The decision of the Missouri Supreme Court affirming respondent's conviction, sentence, and the denial of state post-conviction relief (Pet. App. A-221) is reported at 912 S.W.2d 499 (Mo. 1995).

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on February 16, 2006, and corrected on February 23, 2006. Pet. App. A-2. The court of appeals denied rehearing and rehearing en banc on May 31, 2006. Pet. App. A-220. This Court's jurisdiction rests on 28 U.S.C. §1254(1). The court below had jurisdiction under 28 U.S.C. §2254. The petition for writ of certiorari was filed on August 29, 2006 and granted on December 7, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "[Nor] shall any State deprive any person of life, liberty or property, without due process of law[.]"

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §104(3), 110 Stat. 1214, 1219, 28 U.S.C. §2254(d)(1), provides in relevant part that:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

STATEMENT OF THE CASE

Respondent William Weaver committed a murder-for-hire 19 years ago. He was convicted of first-degree murder and sentenced to death. After the Missouri Supreme Court reviewed and upheld his conviction and sentence, he sought a writ of habeas corpus in federal court. Eventually, the district court granted the writ on the basis that Weaver's due process rights were violated by the prosecutor's penalty-phase closing argument. A divided panel of the United States Court of Appeals for the Eighth Circuit affirmed, and the court denied rehearing en banc by a 5-5 vote.

The murder. The Shurn family owned and operated drug houses. Charles Taylor worked for the Shurns and held title to some of the Shurns' drug houses in his name. Pet. App. A-221. A federal drug prosecution began against Charles and Larry Shurn. Taylor was to be a key witness. *Id.* At some point, the Shurns asked Taylor to sign over some of the properties to them, but he refused. *Id.*, at A-222.

On the morning of July 6, 1987, Daryl Shurn and William Weaver drove to Taylor's apartment in St. Louis, Missouri. Their plan was to force Taylor to sign over the Shurns' drug properties. Then, after Taylor had signed the paperwork, Weaver would kill Taylor. *Id.* The plan went awry.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and ran outside. *Id.* Weaver and Shurn chased him, firing several shots at him and following him into the woods, where he fell from his wounds. *Id.* Weaver and Shurn went back to the automobile, and Weaver reloaded. *Id.* Then Weaver returned to the woods and shot Taylor again. *Id.* Taylor had bullet holes in his abdomen and back, a bullet graze on his arm, and six bullet holes in his head. He died from the shots to his head, which left his skull malleable and semi-liquified his brain. Tr. 1068-1069.

Weaver and Shurn rapidly drove away. Pet. App. A-222. Witnesses at the scene immediately reported the incident to the police, giving a detailed description of the vehicle. *Id.* Police soon spotted it and gave chase. *Id.* Following a collision

during rush-hour traffic on Interstate 70, Weaver and Shurn fled on foot. *Id.* Shurn was captured at the scene, but Weaver ran off towards an apartment complex adjacent to the highway. *Id.* Not far away, another police officer spotted Weaver, running shoeless on a concrete street and sweating profusely. *Id.*

Weaver told the officer that he had been jogging and became lost. He was many miles from his home. *Id.* Weaver was taken to the scene of the accident, where one of the police officers who had originally pursued him positively identified him as the man who had run away from Shurn's car after the crash. *Id.*

While in jail awaiting trial, Weaver told a fellow inmate that he (Weaver) was a "hit man" on the streets and that he and Shurn had killed Charles Taylor. *Id.*, at A-222-A-223. Weaver also told the inmate that his trial testimony would be that he was out jogging when the police stopped him. *Id.*, at A-223.

The trial: guilt phase. The State's theme at trial centered on Weaver's role as the Shurns' hit man in a murder-for-hire to kill a federal witness. *E.g.*, Tr. 629, 637, 984.

The defense agreed in voir dire and throughout the trial that Taylor's murder was "gruesome" or "bad" and that the murder involved a "hit man." *Id.*, at 304-305, 308, 311, 370, 1141, 1153, 1158, 1168, 1177, 1182, 1191, 1196, 1201, 1212; Pet. App. A-289. But it attempted to show that ten of the State's witnesses who identified Weaver or somehow linked him to the murder scene were mistaken (Robert Mackin, Tr. 655-656; Christine Coslick, Tr. 676; Jean Henson, Tr. 698-699; Wendy Holliday, Tr. 713; Scott Smothers, Tr. 727; Officer Gardiner, Tr. 762-763; Willie Jones, Tr. 827; Officer Lee, Tr. 892-893; Jim Orbin, Tr. 1446; Officer Clark, Tr. 1492, 1495).

Rejecting Weaver's claim of mistaken identity, the jury found him guilty of first degree murder. Pet. App. A-223.

The trial: penalty phase. At the beginning of the penalty phase, the court instructed the jurors that consideration of the death penalty rested on the State's proving beyond a reasonable doubt certain propositions relating to aggravating

circumstances. Tr. 1728; Pet. App. A-300-A-303.

The State alleged four aggravating circumstances: that Weaver murdered Taylor at the direction of another person; that the murder was outrageously or wantonly vile; that Taylor was killed because of his status as a witness; and that Weaver had murdered Taylor for money. Pet. App. A-304. The prosecutor introduced no new evidence, resting on evidence adduced during the guilt phase. Tr. 1728-1729.

In mitigation, the defense sought to prove that Weaver had no significant prior criminal history, that he had two young children at home and an ailing mother, that he had worked with young people to help them stay out of trouble before his incarceration, and that during his incarceration he had helped teach other inmates reading and language skills, assisted disable inmates, and was given the position of jail trustee. Pet. App. A-307-A-308. Weaver testified on his own behalf (Tr. 1744), and the defense put on five other witnesses, each of whom testified to Weaver's good character in the community (Debra Jones, Tr. 1731; Atrice Simpson, Tr. 1732-1733; Mary Wrice, Tr. 1736; Rev. Schroeder, Tr. 1737-1738).

After the parties rested, the court gave the jurors more specific instructions on the aggravating and mitigating circumstances and advised them that they were responsible for determining the punishment. Tr. 1756; Pet. App. A-304-A-311. The court also instructed them that they were "not compelled to fix death as the punishment even if [they did] not find the existence of one or more mitigating circumstances sufficient to outweigh [any] aggravating circumstances." Pet. App. A-309. Finally, the court advised the jurors that the attorneys would have the opportunity to argue the case, but instructed them that attorneys' arguments were "not evidence" and that it was the jurors' "duty to be governed in their deliberations by the evidence as [they] remember[ed] it, the reasonable inferences which [they] believ[ed] should be drawn therefrom, and the law as given in [the] instructions." *Id.*, at A-312.

In his closing, the prosecutor returned to Weaver's role as a hit-man for drug dealers. Pet. App. A-276, A-278, A-281-282, A-285. He argued that Weaver's guilt had been "obvious" based on the evidence and urged the jurors not to second-guess

the guilty verdict. *Id.*, at A-275. He also told them, "If you want to spare his life, that's your discretion; that's your decision. But do it for the right reasons, not the wrong ones." *Id.* He stated that the decision to impose the death penalty was a difficult one to make, regardless of the circumstances (*Id.*, at A-276, A-282-A-283, A-284, A-286), but that this case presented appropriate circumstances (*Id.*, at A-277, A-280, A-283-A-286).

In a portion of the argument highlighted by the court of appeals,[1] the prosecutor continued:

> "It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the William Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.
>
> "Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well it was right to kill then and it's right to kill him now." Pet. App. A-277.

Weaver did not object. *Id.*

The prosecutor then returned to the nature of Weaver's crime, emphasizing that a "high level drug operation" chose Weaver as its hit man to kill a federal witness. *Id.*, at A-278.

---

[1]Pet. App. A-4-A-5.

The prosecutor again urged the jurors not to second-guess their verdict and reminded them that during voir dire they said that they could impose the death penalty in the right case. *Id.*, at A-278-A-279. The prosecutor also drew the jurors' attention to Weaver's lack of emotion during the trial and to the execution style of the killing. *Id.*, at A-283. And he argued that all four aggravating circumstances applied. *Id.*, at A-285.

Nearing the end of his time, the prosecutor made the following statement highlighted by the court of appeals[2]:

> "This case - - I guess it's one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.
>
> "When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business." Pet. App. A-285-A-286.

Weaver did not object. *Id.*

When Weaver's counsel addressed the jurors, she told them that she honestly believed that her client was innocent and that there was a real possibility that the guilty verdict was wrong. *Id.*, at A-287-A-289, A-291. Approximately half of her closing centered on this theme. She also conceded that what had happened to Taylor "was bad. We cannot disagree on that." *Id.*, at A-289. But she urged the jurors to "fight for life,"

---

[2]Pet. App. A-5.

telling them that the mitigating evidence showed that there was "good" in Weaver. *Id.*, at A-290-A-291.

Responding to the prosecutor's summation, defense counsel reminded the jurors that the law allowed them to consider life "even for a crime like this," and urged them not to "let [the prosecutor] make [them] feel that ... if you don't say death, there's no case." *Id.*, at A-289. She closed by arguing:

> "[I]f you vote for life, you are still doing your duty. If you vote for life, you are sending a message. Because nobody loves being incarcerated and nobody would want to be locked up for life, never to see the sun or touch a tree if you want to. Nobody wants that. One -- I don't know which juror said it. One juror said it's almost a living death as I see it. And she's right. It is like a living death. And you're behind these bars so you're away from society and society is protected because you don't come back, you see. So you don't have that concern. You've sent your message. You've done your job." *Id.*, at A-292.

In his final summation, the prosecutor began with a response to Weaver's concluding remarks, in another portion of argument that the court of appeals highlighted[3]:

> "And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and

---

[3]Pet. App. A-6-A-7. The court of appeals highlighted the first and fourth quoted paragraphs in one block quote, with the intervening second and third paragraphs deleted, as indicated by ellipses.

> convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced your guilty, we're going to give you life in prison? That's not the right message.
>
> "Prison doesn't scare these people. Death would scare them. They surrendered at the moment of truth. When Shurn was told by [Officer Gardiner to] stop [after the crash], he knew he was going to get blown away. Did he stop? Well, did you think he didn't think he'd end up going to prison. He was caught moments after the murder. He knew he'd go to prison, but he stopped because he doesn't want to get killed. William Weaver doesn't want to die. Charles Taylor didn't want to die.
>
> "William Weaver when he saw [Officer] Crain, he's too tired to run anymore. He's too tired, so he tried to talk his way out of it. Was he going to run? I mean when Crain said, 'I'm going to have to take you in,' did he bolt? No. He wants to live. The message has to be death for these types of people. That's the only message they are going to understand.
>
> "The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that." Pet. App. A-292-A-294.

Weaver did not object. *Id.*

The prosecutor continued his response to Weaver's closing:

> "Yeah, there's a possibility your verdict could be wrong. Does that mean we shouldn't ever sentence anybody to die? That's the only logical result from that argument. That's what that means: Because there is a remote possibility we could be wrong, therefore, society never has the right to sentence anybody to die. All twelve of you said you agree with the death penalty, that you could impose it in the right case. Well, you're never a hundred percent sure of anything." *Id.*, at A-294.

Weaver did not object. *Id.*

The prosecutor continued in another portion of argument highlighted by the court of appeals[4]:

> "So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty." Pet. App. A-294.

Weaver objected, and the court instructed the jurors to disregard the prosecutor's last statement. *Id.*

The prosecutor next argued that while Taylor could not be brought back to life,

> "we can save other lives. The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this. If some of those people really thought they faced the

---

[4]Pet. App. A-3.

> prospect of a death penalty, some of them wouldn't do it." Pet. App. A-295.

After referring again to Weaver's lack of emotion at the trial, in contrast to the tears Weaver shed during the penalty phase, the prosecutor continued with another statement identified by the court of appeals[5]:

> "He doesn't want to die. Same reason he surrendered to Officer Crain. He didn't want to get shot. He'd rather go to prison. You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do." Pet. App. A-295.

Weaver did not object. *Id.*

The prosecutor then addressed the mitigating evidence and reemphasized the lack of doubt as to Weaver's guilt, the execution style of the killing, and Weaver's close relationship with the Shum family. *Id.*, at A-296-A-297. The prosecutor next argued, in a statement highlighted by the court of appeals[6]:

> "It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement office in the county. I decide in which cases we ask for the death penalty and in which cases we don't." Pet. App. A-297.

Weaver objected to the latter portion of this statement, and the

---

[5]Pet. App. A-7. The court of appeals' quotation omitted the first four sentences from the quoted paragraph.

[6]Pet. App. A-7.

court instructed the jurors to disregard the prosecutor's "last comment." *Id.*, at A-298.

The prosecutor went on to state, as the court of appeals highlighted[7]:

> "Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> "I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they going to go out in battle and they were scared young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do." Pet. App. A-298.

Weaver objected to the movie example as intended to inflame. *Id.* The prosecutor responded that "[it was] just an analogy," and the court overruled the objection. *Id.*, at A-299.

The prosecutor then concluded his final summation:

> "[Patton] said, 'You'll know what to do.' Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with your brain and you made the right decision. Today, you've got to reach down into

---

[7]Pet. App. A-3-A-4.

> your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we sentence you to die. You know what to do. Please have the courage to do it. Thank you." Pet. App. A-299.

Weaver did not object. *Id.*

The jury recommended the death penalty, finding three statutory aggravating circumstances: that Weaver murdered Taylor at the direction of another person; that the murder was outrageously or wantonly vile; that Taylor was killed because of his status as a witness. Pet. App. A-313-A-314. Accepting the jury's recommendation, the trial court sentenced Weaver to death. *Id.*, at A-223.

The post-conviction proceedings and appeal. Weaver moved for post-conviction relief, which the trial court denied. Pet. App. A-258.

Weaver then pursued a consolidated appeal in the Missouri Supreme Court. His 125-page opening brief identified 21 points of error. Weaver Mo. S. Ct. Opening Br. 12-39. Point IV contained two relevant subsections that addressed the prosecutor's guilt and penalty phase closing arguments. Joint App. 44. Section A argued that the prosecutor, in both phases, improperly exploited his position as the elected prosecutor. *Id.*, at 46-52. Section C, consisting of two pages of argument, asserted that the prosecutor made "other improper arguments" that lacked adequate evidentiary support, including the argument that the death penalty was a deterrent. *Id.*, at 58-61. Weaver argued in the alternative that his trial counsel was ineffective for failing to object to many of the prosecutor's arguments. *Id.*, at 44-45, 61.

The Missouri Supreme Court unanimously affirmed Weaver's conviction, sentence, and the denial of post-conviction relief. *State v. Weaver*, 912 S.W.2d 499 (Mo. 1995); Pet. App. A-221. Concerning Point IV, the court held that its "review of the [prosecutor's] arguments discloses neither error in permitting the arguments nor ineffective assistance of

counsel in failing to object." Pet. App. A-232.

More specifically, with regard to Point IV.A., the court held that the trial court "properly sustained the objections and directed the jurors to disregard the argument" regarding the prosecutor's position as prosecuting attorney of the county. *Id.*, at A-234. In rejecting Weaver's limited, Point IV.C. argument, the court noted that Weaver had "put[] forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support," including "that the death penalty would be a deterrent." *Id.*, at A-236-A-237. But it found no merit to Weaver's claim:

> "Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit." Pet. App. A-237.

This Court denied review. *Weaver v. Missouri*, 519 U.S. 856 (1996).

Habeas proceedings. Weaver pursued federal habeas relief under 28 U.S.C. §2254. The United States District Court for the Eastern District of Missouri granted the petition for a violation under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Weaver v. Bowersox*, No. 4:96-CV-2220-CAS (E.D. Mo. Aug. 9, 1999); Pet. App. A-203. The United States Court of Appeals for the Eighth Circuit reversed the *Batson* holding and remanded for consideration of Weaver's remaining habeas claims. *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001); Pet. App. A-187.

On remand, the district court granted Weaver relief as to the penalty phase on grounds that the prosecutor's penalty

phase closing argument violated his due process rights. *Weaver v. Bowersox*, No. 4:96-CV-2220-CAS (E.D. Mo. May 7, 2003); Pet. App. A-56-A-72.

A divided panel of the court of appeals affirmed, with each judge writing separately. *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006); Pet. App. A-2.

In the principal opinion, Judge Melloy concluded that the Missouri Supreme Court sufficiently decided Weaver's federal habeas claim to be entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* Judge Melloy then characterized the prosecutor's penalty phase closing arguments as falling into five categories:

> "(1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs'; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')." *Id.*, at A-13.

With regard to "category (1)," Judge Melloy concluded that "[d]escribing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment" (*id.*, *citing Zant v. Stephens*, 462 U.S. 862, 879 (1983)), and that it "'diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment'" (Pet. App. A-13, *quoting Caldwell v. Mississippi*, 472 U.S. 320 (1985)). He concluded that "categories (2), (4), and (5)" were "improperly inflammatory under several existing United States Supreme Court precedents," but cited only Eighth Circuit precedent in his analysis. *Id.*, at A-14, *citing Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir.

1989), *cert. denied*, 497 U.S. 1038 (1990), and *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999), *cert. denied*, 528 U.S. 1010 (2000).

Calling "[c]ategory (3) ... factually distinct, but similar to arguments that are improper under existing law[,]" Judge Melloy identified several of this Court's Eighth Amendment cases as supplying the "controlling Supreme Court precedent" that "capital sentencing [must] be an individualized decision-making process." Pet. App. A-14, *citing Jones v. United States*, 527 U.S. 373 (1999), *Buchanan v. Angelone*, 522 U.S. 269 (1998), *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Zant*, 462 U.S., at 879. Citing Eighth Circuit precedent, Judge Melloy further concluded that arguments "that a signal must be sent from one case to affect other cases," invoking a jury's general fear of crime to encourage application of the death penalty," and "[u]sing the conscience of the community as a guiding principle for punishment" all improperly burden a defendant. Pet. App. A-15, *citing Sublett v. Dormire*, 217 F.3d 598, 600-601 (8th Cir. 2000), *cert. denied*, 531 U.S. 1128 (2001), *Copeland v. Washington*, 232 F.3d 969, 972-973 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001), and *United States v. Johnson*, 968 F.2d 768, 770-771 (8th Cir. 1992).

Finally, Judge Melloy observed that it "is unclear which precedents the Missouri Supreme Court applied," but concluded that "there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents." Pet. App. A-15-A-16.

Judge Bye concurred in the result, writing separately because he did not believe that AEDPA applied. *Id.*, at A-16. But he agreed with Judge Melloy that the prosecutor's arguments "clearly violated Weaver's constitutional rights." *Id.*, at A-20.

Senior Judge Bowman concurred with Judge Melloy that AEDPA applied, but he dissented because he did "not think that the Court correctly appl[ied AEDPA's] standard to Weaver's claims." Pet. App. A-20. In his view, the fact that Judge Melloy had described several of Weaver's claims as

"factually unique" or "factually distinct" raised "red flags." *Id.*, at A-20. In addition, Judge Bowman noted that the Supreme Court cases to which Judge Melloy referred stood only "for general propositions"; they did not "touch[] on [Weaver's] distinct claims of prosecutorial misconduct." *Id.*, at A-21. "Because of the apparent inconclusive state of Supreme Court jurisprudence on the alleged constitutional violation" alleged in Weaver's particular case, Judge Bowman concluded, he would "hold that the state court's decision was neither contrary to nor an objectively unreasonable application of federal law." *Id.*, at A-22.

On May 31, 2006, the court of appeals denied the State's petition for rehearing. The court also denied the State's petition for rehearing en banc in a 5-5 decision. *Id.*, at A-220.

SUMMARY OF ARGUMENT

The Missouri Supreme Court's decision rejecting Weaver's due process challenge to the prosecutor's penalty phase closing arguments was neither "contrary to" nor an "unreasonable application" of clearly established federal law within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d)(1).

Under §2254(d)(1), the appropriate federal law framework for analyzing Weaver's due process claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994). In each case, the Court reviewed alleged prosecutorial misconduct within the context of the "entire proceedings" to assess whether it "so infected" a criminal defendant's murder trial or capital sentencing hearing "with unfairness as to make the resulting conviction [or death sentence] a denial of due process." *Donnelly*, 416 U.S., at 643. In each case, the Court concluded that no due process violation occurred, even when the Court agreed that the prosecutor's conduct deserved universal condemnation.

The Missouri Supreme Court's decision was not "contrary to" *Donnelly*, *Darden*, or *Romano* because the state high court identified the correct constitutional principles and because, in finding no due process violation, it reached the

same result as this Court reached in *Donnelly*, *Darden*, and *Romano*.

The Missouri Supreme Court's decision was not an "unreasonable application" of *Donnelly*, *Darden*, or *Romano* either. In those cases, this Court looked to several guideposts to help determine the significance of the challenged prosecutorial conduct, including: (i) whether the prosecutor misstated or misrepresented the evidence; (ii) the nature of the trial court's instructions on the law and any curative instructions; (iii) the substance of, and any ambiguity in, the complained of prosecutorial remark or remarks, and any arguments or counter arguments by the defense; and (iv) the weight of the State's evidence favoring guilt or the death penalty, as appropriate.

Here, the prosecutor did not misstate or misrepresent any evidence. The trial court properly instructed the jury as to its role in sentencing and that the prosecutor's arguments were not evidence. The court also properly instructed the jury to disregard certain of the prosecutor's comments. Even if the jury had let the complained of prosecutorial comments influence its decision, the comments were effectively rebutted by defense counsel and were not so pervasive or unambiguously beyond the pale as to unconstitutionally taint the proceedings. In addition, the State's case for the death penalty was particularly strong. The three aggravating circumstances found by the jury were largely undisputed once Weaver's mistaken identity defense had been rejected, and the mitigating circumstances did not diminish Weaver's blameworthiness for the crime.

Finally, the court of appeals' contrary analysis rests on a flawed application of AEDPA and due process principles, and, to some extent, a misreading of the record. The principal opinion looked to circuit precedent, rather than this Court's on-point cases, when assessing the Missouri Supreme Court's decision. Further, the court of appeals examined the prosecutor's comments in a vacuum and did not mention, much less adequately consider, the *Donnelly/Darden/Romano* guideposts. Finally, the court chose to ascribe meanings to certain of the prosecutor's comments that are not well supported by the record.

ARGUMENT

WEAVER IS NOT ENTITLED TO FEDERAL HABEAS RELIEF BECAUSE THE MISSOURI SUPREME COURT'S DECISION WAS NOT CONTRARY TO NOR UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW.

Weaver's ability to obtain federal habeas relief is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA prohibits federal habeas relief unless the state court decision under review either is contrary to or unreasonably applies "clearly established Federal law":

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

"Clearly established Federal law" means "the holdings, as opposed to the dicta of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006).

AEDPA review of state court decisions is thus "highly deferential." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). Under §2254(d)(1), a state court decision is not "contrary to" clearly established federal law unless the state court applies a different rule than one set forth in this Court's cases, or it reaches a different conclusion than this Court has reached when confronting materially indistinguishable facts. *Williams*, 529 U.S., at 405-408; *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state court decision is not "an unreasonable application" of clearly established federal law unless the state court applies

correct legal principle to the facts of a particular case in an objectively unreasonable (as opposed to merely erroneous) manner. *Williams*, 529 U.S., at 409-410; *Cone*, 535 U.S., at 694.

A. *Donnelly v. DeChristoforo*, *Darden v. Wainwright*, and *Romano v. Oklahoma* supply the federal law framework for Weaver's due process claim.

Weaver claimed that the prosecutor's closing arguments violated his rights under the Due Process Clause of the Fourteenth Amendment. The "clearly established Federal law" applicable to his claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994).

In *Donnelly*, the Court considered whether certain prosecutorial remarks made during closing argument of a state murder trial (namely, a personal expression as to guilt and a comment on the defendant's motives for standing trial), violated a habeas petitioner's due process rights. 416 U.S., at 639. The issue in *Donnelly* was not that "the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel," where "special care" must be taken "to assure that prosecutorial conduct in no way impermissibly infringes" on a particular guarantee. *Id.*, at 643. Rather, it was the more general one: whether challenged remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

As to that inquiry, the Court emphasized, there was an "important" distinction between ordinary trial errors "which might call for application of supervisory powers" and constitutional infirmities that "constitute[] a failure to observe that fundamental fairness essential to the very concept of justice." *Id.*, at 642. *See also id.*, at 647-648. Examining the remarks through this lens, and in the context of "the entire proceedings," *id.*, at 643, the Court concluded that the remarks did not amount to a constitutional violation, in part because the trial court issued a curative instruction and because the prosecutor's remarks were ambiguous and "[i]solated passages" in an argument "billed in advance to the jury as a matter of opinion not of evidence." *Id.*, at 646.

Darden v. Wainwright involved a similar issue. Again, a state prisoner claimed that he was denied the process due to him by a prosecutor's guilt-phase closing argument. Some of the challenged prosecutorial remarks "implied that the death penalty would be the only guarantee against a future similar act." 477 U.S., at 180. Others called the defendant an "animal," a word used by the defense attorney during his summation to describe the perpetrator of the crimes (whom he suggested was someone other than the defendant). *Id.* Yet other of the prosecutor's remarks were, in this Court's words, "offensive comments reflecting an emotional reaction to the case." *Id.*[8]

Although the Court believed that the prosecutor's "argument deserve[d] the condemnation it has received from every court to review it," it nonetheless concluded that the argument "did not deprive [the petitioner] of a fair trial." *Id.*, at 181. In reaching this holding, the Court found several points significant. First, that the prosecutor's argument "did not manipulate or misstate the evidence." *Id.*, at 181-182. Second, that many of the prosecutor's comments were in reaction to statements made by the defense in its opening summation. *Id.*, at 182. Third, that the trial court had "instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence." *Id.*, at 182. Fourth, that there was "overwhelming eyewitness and circumstantial evidence" to convict, "reduc[ing] the likelihood that the jury's decision was influenced by argument." *Id.* And last, that the defense had effectively turned prosecutor's statements against him during rebuttal. *Id.*

---

[8]As quoted in *Darden*, such comments included the following: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown [the defendant's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." "I wish someone had walked in the back door and blown his head off at that point." "He fired in the boy's [another victim's] back, number five, saving one [bullet]. Didn't get a chance to use it. I wish that he had used it on himself." 477 U.S., at 181 n.12.

Finally, *Romano v. Oklahoma* addressed a claim that introduction of evidence of a prior death sentence deprived a state habeas petitioner of due process during the sentencing phase of his capital murder trial. Noting that it was "settled" that the Fourteenth Amendment's Due Process Clause "applies to the sentencing phase of capital trials," the Court drew on *Donnelly* and *Darden* to formulate the appropriate test for this claim – "whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." 512 U.S., at 12-13.

The Court concluded that no such denial occurred, because "the instructions did not offer the jurors any means by which to give effect to the [challenged] evidence ..., and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case." *Id.*, at 13. The Court also observed that even if the jurors had let the prior death sentence affect their decision, it seemed "equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so," a point that rendered acceptance of the petitioner's theory "an exercise in speculation, rather than reasoned judgment." *Id.*, at 14.

B. The Missouri Supreme Court's decision was not "contrary to" *Donnelly*, *Darden*, or *Romano*.

The court of appeals' decision rested on §2254(d)(1)'s "unreasonable application" rather than its "contrary to" prong. But the court did not rule out the latter possibility, specifically commenting that it was "unclear which precedents the Missouri Supreme Court applied" in assessing Weaver's claim. Pet. App. A-16. There is no question, however, that the state high court decision was not "contrary to" clearly establish law within the meaning of AEDPA.

In analyzing Weaver's claim, the state high court looked to federal appellate precedent that itself relied on *Donnelly* and *Darden* to determine if a due process violation occurred. *See id.*, at A-235, *citing Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). Furthermore, the state court reviewed the challenged prosecutorial comments

for reasonableness and assessed the effect of the trial court's curative instructions, consistent with the approach taken in *Donnelly*, *Darden*, and *Romano*. *See* Pet. App. A-233-A-237. And so the state court's decision was not "contrary to" this Court's cases for having applied the wrong rule.[9] *See Early v. Packer*, 537 U.S. 3, 8 (2003) (per curiam) (§2254(d)(1) does "not require citation" or "awareness" of this Court's cases "so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis removed).

In addition, the state high court's rejection of Weaver's claim was not "contrary to" this Court's cases for having reached a different conclusion than this Court when confronting materially indistinguishable facts. This Court likewise rejected the due process claims considered in *Donnelly*, *Darden*, and *Romano*.

C. The Missouri Supreme Court's decision was not an "unreasonable application" of *Donnelly*, *Darden*, or *Romano*.

The second prong of §2254(d)(1) is whether the Missouri Supreme Court unreasonably applied clearly established federal law to the facts of Weaver's case. The answer is "no." In fact, a conclusion that the prosecutor's arguments did not so "infect[] [Weaver's] sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process," *Romano*, 512 U.S., at 12-13, is wholly consistent with *Donnelly*, *Darden*, and *Romano*.

As discussed above, in *Donnelly*, *Darden*, and *Romano* the Court looked to several guideposts to help determine the significance of the challenged prosecutorial remarks in the context of the proceeding as a whole. These included: (i) whether the prosecutor misstated or misrepresented the

---

[9]Even Weaver conceded in his federal appellate briefs that the state high court identified "the correct" constitutional principles in analyzing his habeas claim. Weaver Ct. App. Br. 13.

evidence[10]; (ii) the nature of the trial court's instructions on the law and any curative instructions[11]; (iii) the substance of, and any ambiguity in, the complained of prosecutorial remark or remarks, and any arguments or counter arguments by the defense[12]; and (iv) the weight of the State's evidence favoring guilt or the death penalty, as appropriate.[13]

These guideposts indicate that Weaver's sentencing proceeding was not fundamentally unfair.

First, the prosecutor did not misstate or misrepresent any evidence. Indeed, the evidence of the aggravating (and mitigating) factors in this case was largely undisputed, including the heinous nature of Charles Taylor's killing and the fact that it was a murder-for-hire to prevent a witness from testifying against a major drug family in a federal drug prosecution.

Second, the trial court properly instructed the jurors as to their role and as the matters that they were to consider in determining punishment. At the beginning of the proceeding, the court advised the jurors that their consideration of the death penalty was dependent on the State proving "certain propositions relating to aggravating circumstances" beyond a reasonable doubt. Pet. App. A-300. After the close of evidence, the trial court gave a more detailed instruction –Instruction No. 23– listing the four aggravating circumstances in the case. Tr. 1756; Pet. App. A-304-A-305. Then, in Instruction No. 24, the court instructed the jurors that when assessing whether aggravating circumstances warranting the death penalty existed they could consider any of the aggravating circumstances they had unanimously found beyond a reasonable

---

[10]*Donnelly*, 416 U.S., at 646; *Darden*, 477 U.S., at 181-182;

[11]*Donnelly*, 416 U.S., at 644-645; *Darden*, 477 U.S., at 182; *Romano*, 512 U.S., at 13.

[12]*Donnelly*, 416 U.S., at 646-647; *Darden*, 477 U.S., at 182; *Romano*, 512 U.S., at 14.

[13]*Darden*, 477 U.S., at 182; *Romano*, 512 U.S., at 13.

doubt under Instruction No. 23 and the "evidence relating to the murder of Charles Taylor." Pet. App. A-306. The last instruction the jurors heard before closing arguments was the court's instruction that the attorneys' arguments were "not evidence," and that it was the jurors' "duty to be governed in [their] deliberations by the evidence as [they] remember[ed] it ... and the law as given in these instructions." *Id.*, at A-312.

The trial court's instructions during the prosecutor's closing argument further undercut a conclusion that the state court's decision was less than reasonable. When the defense objected to the prosecutor's statement that "if you don't sentence [Weaver] to die in this case, there's no point in having a death penalty," the court sustained the objection and instructed the jurors to "disregard the [prosecutor's] last comment." Pet. App. A-294. The trial court also sustained the defense's objection to, and instructed the jurors to disregard, the prosecutor's statement that he was the "top law enforcement office in the county" and decided "which cases we ask for the death penalty and which we don't." *Id.*, at A-297-A-298. Under this Court's precedents, it is presumed that the jurors followed these, and all other of, the trial court's instructions. *Richardson v. Marsh*, 481 U.S. 200, 206-207, 211 (1987); *Romano*, 512 U.S., at 13.

While Weaver's defense counsel did not object to the remaining remarks about which Weaver has since complained (with the exception of the prosecutor's analogy to the movie "Patton"), the jury did not consider the arguments, assuming – as the law requires – that the jury followed the trial court's general instructions. None went directly to the fact issues before the jury – whether the State proved aggravating circumstances and whether the aggravating circumstances outweighed any mitigating circumstances, such that the death penalty was appropriate – and none were evidence in the case.

Third, even if the jurors had let the prosecutor's remarks influence their decision, the remarks, when considered in the context of the proceedings as a whole, were not so beyond the pale that they deprived Weaver of a fair sentencing proceeding. As the Court explained in *Darden*, a defendant must show more than that the prosecutor's arguments were "undesirable" or even "universally condemned." 477 U.S., at 181 (internal quotations

omitted). A defendant must show that the comments "so infected the sentencing proceeding with unfairness as to make the jury's imposition of the death penalty a denial of due process." *Romano*, 512 U.S., at 12.

Here, the remarks that the trial court specifically instructed the jurors to disregard were "[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence." *Donnelly*, 416 U.S., at 647. As such, they are unlikely to have "profoundly impress[ed]" the jurors and tainted the entire proceedings. *Id.*

The other comments about which Weaver complained (which the jurors were not specifically instructed to disregard) primarily centered around the prosecutor's theme that imposing the death penalty on Weaver would "send" a "message" to other drug dealers and their hit men that would "deter business killings." Pet. App. A-277, A-295. Others alluded to self defense and the movie "Patton." *Id.*, at A-277, A-298.

If the former comments had any impact, it was lessened by the defense counsel's arguments that the alternative punishment – life in prison without possibility of parole – would also "send[] a message," because "nobody loves being incarcerated and nobody would want to be locked up for life, never to see the sun or touch a tree" and because being behind bars was "like a living death." Pet. App. A-292. Defense counsel's reminder that the law allowed the jurors to consider life "even for a crime like this" and her urges not to "let [the prosecutor] make [them] feel that ... if you don't say death, there's no case" also effectively countered the prosecutor's statements. *Id.*, at A-289.[14]

---

[14]With regard to the prosecutor's comments about imposing the death penalty as a message to others, it is important to note that these comments were part of the prosecutor's larger argument that the death penalty serves to deter premeditated capital crimes, which is one of the recognized justifications for the death penalty. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting that "'retribution and deterrence of capital crimes by prospective offenders'" have been identified as "the social purposes served by the death penalty"), *quoting Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion

The prosecutor's allusions to self defense and a scene in the movie "Patton" likewise were unlikely to have unconstitutionally contaminated the proceedings. Read in context, the prosecutor's statements appear to have been intended to make the points that for people who respect the law, choosing death is difficult, but there are certain instances in which the law recognizes killing as justified and appropriate, and that Weaver's case was one of them. *See, e.g.*, Pet. App. A-277 ("Sometimes killing is not only fair and justified; it's right." "If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been in self-defense. Well it was right to kill then and it's right to kill him now."); *id.*, at A-298 (describing scene in "Patton" in which General Patton was talking to his troops the night before a battle and was trying to explain to them "that sometimes you've got to kill ... because it's right").

While the "Patton" analogy in particular could have been more artfully drawn, under *Donnelly*, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S., at 647. And here, the fairest contextual reading of these comments is the least damaging.

Fourth, the State's case for the death penalty was particularly strong, further lessening the likelihood that the jury was unfairly swayed. As noted, it was essentially undisputed that Taylor's killing was a particularly wanton murder-for-hire of a potential federal witness. So, once Weaver's mistaken identity defense was rejected in the guilt phase, the jury's finding of three aggravating factors was largely a foregone conclusion. Furthermore, Weaver's mitigating evidence was not particularly strong or dramatic. The defense was able to show that he had no significant criminal history, that he had two young children and an ailing mother, and that he had worked with young people to encourage them to stay out of trouble and with inmates. Because none of those factors lessened Weaver's

---

of Stewart, Powell, and Stevens, JJ.).

blameworthiness for the killing, the aggravating circumstances plainly outweighed the mitigating, making the jury's choice of the death penalty the logical outcome.

Finally, even if the Missouri Supreme Court's rejection of Weaver's due process claim cannot be considered wholly consistent with *Donnelly*, *Darden*, and *Romano*, at the very least it was not an "unreasonable application" of those cases. The due process principle discussed in *Donnelly*, *Darden*, and *Romano* is a broad and general rule, with "fundamental fairness" in light of the "entire proceedings" as its touchstone. As this Court observed in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the more general the rule, the more leeway courts have in reaching outcomes in case by case determination" under the "unreasonable application" prong of §2254(d)(1). *Id.*, at 664. Here, for the reasons stated above, the state high court's application of the Court's broad and general due process rule cannot fairly be deemed "unreasonable" within the meaning of §2254(d)(1).

D. The court of appeals' contrary analysis was wrong.

The court of appeals determined that Weaver was entitled to relief notwithstanding §2254(d)(1). But the result it reached rests on a flawed analysis of the law and, to a lesser extent, the record.

First, despite quoting §2254(d)(1) and citing *Williams v. Taylor*, 529 U.S. 362 (2000), the court of appeals did not accord the Missouri Supreme Court's decision AEDPA deference. For example, rather than comparing the state court's analysis to that of this Court's due process cases (the "clearly established Federal law" under §2254(d)(1)), the court of appeals judged the state court's decision against its own circuit precedents, some of which predated AEDPA. *See* Pet. App. A-13, *citing Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990) and *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995), *cert. denied*, 516 U.S. 1067 (1996); Pet. App. A-14, *citing Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995); and Pet. App. A-15, *citing United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992).

And when the court of appeals did refer to this Court's

cases, it frequently referred to cases that did not address due process claims like Weaver's, but Eighth Amendment precedent not directly on point. *See* Pet. App. A-14, *citing Jones v. United State*, 527 U.S. 373 (1999) (Eighth Amendment did not require jury to be instructed on consequences of a deadlock), *Buchanan v. Angelone*, 522 U.S. 269 (1998) (Eighth Amendment did not require jury to be instructed on concept of mitigation or be given express guidance on particular statutorily defined mitigating factors), and *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Eighth Amendment proportionality principle was offended by life sentence without possibility of parole for crime of possession of approximately 1.5 lbs of cocaine); Pet. App. A-15, *citing Zant v. Stephens*, 462 U.S. 862 (1983) (Eighth Amendment not violated by Georgia's statutory aggravating circumstance scheme, which did not guide sentencing body in exercising its discretion apart from narrowing class of murderers eligible for the death penalty).

Second, the court of appeals' analysis of Weaver's claim was itself contrary to the approach taken in *Donnelly*, *Darden*, and *Romano*. Whereas this Court's cases teach that any allegedly improper prosecutorial remarks must be judged after "an examination of the entire proceedings," *Donnelly*, 416 U.S., at 643, the court of appeals looked at each comment in a vacuum. The court of appeals did not mention, much less adequately consider, the trial court's instructions, the defense's counter arguments, or the overwhelming strength of the aggravating circumstances as compared to the mitigating circumstances shown by the defense – all things that this Court considered in *Donnelly*, *Darden*, and *Romano*.

Third, some of the court of appeals' statements about the nature of the prosecutor's comments are difficult to square with the record. For instance, the court described the prosecutor as having suggested that "executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs'" (Pet. App. A-13), when the prosecutor never referred to a "war on drugs" and his comments about "sending a message" to other criminals was evidently directed at deterring other for-hire murders. In another passage, the court characterized some of the prosecutor's comments as "arguments against a rational decision by the jury" which "implor[ed] the jury to kill the defendant immediately." Pet. App. A-14; *see also id.*, at A-13

(referring to argument as one "designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')"). But taken in context, the prosecutor was apparently trying to argue that imposing the death penalty is similar to self-defense killings in that both are instances in which the law recognizes death as justified. *See* Pet. App. A-277, A-298.

Most egregious, however, is the court's suggestion that the prosecutor's reference to the movie "Patton" "should be taken as 'calculated to remove reason and responsibility from the sentencing process.'" Pet. App. A-13, *quoting Newlon*, 885 F.2d, at 1338. The prosecutor's "Patton" reference was, of course, imprecise. As then-Justice Rehnquist aptly observed in *Donnelly*, closing arguments "are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." 416 U.S., at 646-647. And so courts must be careful when trying to assess the impact a particular argument or comment may have had on the jury. *Id.*, at 647.

But regardless of its clarity, the prosecutor's "Patton" reference was not, as the court of appeals suggested, akin to a commanding officer's order to his subordinates to kill the enemy, intended to relieve the jurors of any individual responsibility in selecting punishment. As discussed above, in context the prosecutor appears to have intended to make the more innocuous point that choosing death is a difficult decision for law-abiding persons, but that there are certain instances in which the law recognizes death as justified, and that Weaver's case was one of them. Even if the jurors took the statements differently, however, it is equally plausible that they understood the prosecutor to be emphasizing their personal responsibility in choosing the appropriate punishment, rather than diminishing it, for he reiterated that *the jury* had to make the decision to impose death, as the trial court had properly instructed. Pet. App. A-299.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
ANDREA K. SPILLARS
Chief Counsel, Public Safety Division
STEPHEN D. HAWKE*
ALANA M. BARRAGÁN-SCOTT
HEIDI C. DOERHOFF
RONALD S. RIBAUDO
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102-0899
Phone: (573) 751-3321
Fax: (573) 751-3825

Counsel for Petitioner

**Counsel of record*

January 2007

No. 06-313

In The
Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

WILLIAM WEAVER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

JEAN H. BECME
SUSAN L. JOHNSON
THEODORE W. MORRISON
CORNELL LAW SCHOOL
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

KENT M. WEYBLE
1247 Sumter St., Ste. 201
Columbia, SC 29201
(803) 765-1044

PHILIP HORWITZ
3460 Hampton, Ste. 205
St. Louis, MO 63139
(314) 481-6733

Counsel of Record

ERIC W. BUTLER
720 Olive St., Ste. 1630
St. Louis, MO 63101
(314) 621-1017

CHERYL A. WATTS
ELIZABETH C. CARVER
JOHN W. BOGGS
K. LEE MARSHALL
JAMES R. WYRSCH
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Ste. 3600
St. Louis, MO 63102-2750
(314) 259-2000

Counsel for Respondent

BEST AVAILABLE COPY

PETITIONER'S QUESTION PRESENTED

Since this Court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

RESPONDENT'S STATEMENT OF THE CASE 1

I. WESTFALL'S PENALTY-PHASE CLOSING ARGUMENTS 1

II. DEFENSE COUNSEL'S SUMMATION 6

III. THE TRIAL COURT'S INSTRUCTIONS 7

IV. THE EVIDENCE BEFORE THE JURY AT THE TIME OF WESTFALL'S ARGUMENT 8

A. The Guilt-Phase Evidence 8

B. The Penalty-Phase Evidence 11

V. STATE COURT DECISION OF WEAVER'S DUE PROCESS CLAIM 11

VI. FEDERAL COURT PROCEEDINGS 14

SUMMARY OF ARGUMENT 17

ARGUMENT 20

I. FOR TWO DISTINCT REASONS, CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED 20

A. The Only Ground for Reversal Now Advanced by the Warden is Outside and Irreconcilable with the Question Presented 20

B. The Decision of the Court of Appeals Rests on Two Independent Grounds, and the Warden Has Challenged Only One of Them 23

TABLE OF CONTENTS – Continued

Page

II. THE CLEARLY ESTABLISHED ELEMENTS OF DUE PROCESS IN PROSECUTORIAL CLOSING ARGUMENT 26

A. The Due Process Standard 27

B. Components of the Due Process Calculus 28

III. WESTFALL'S ARGUMENT INFECTED THE SENTENCING PHASE OF WEAVER'S TRIAL WITH FUNDAMENTAL UNFAIRNESS 32

IV. THE MISSOURI SUPREME COURT'S DECISION INVOLVED AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENTS 39

A. The "Unreasonable Application" Inquiry as Demonstrated by this Court 39

B. The Missouri Supreme Court Unreasonably Applied the Relevant Due Process Rule 43

CONCLUSION 50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 25

American National Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985) 22

Atkins v. Virginia, 536 U.S. 304 (2002) 32

Bates v. Bell, 402 F.3d 635 (6th Cir. 2005) 26

Batson v. Kentucky, 476 U.S. 79 (1986) 14

Belcher v. Stengel, 429 U.S. 118 (1976) 26

Bell v. Cone, 543 U.S. 447 (2005) 41, 46

Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) 27

Berger v. United States, 295 U.S. 78 (1935) 16, 37

Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990) 27

Caldwell v. Mississippi, 472 U.S. 320 (1985) 24

California v. Brown, 479 U.S. 538 (1987) 35

Carey v. Musladin, 127 S. Ct. 649 (2006) 26

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 22

Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000) 16

Darden v. Wainwright, 477 U.S. 168 (1986) ..... *passim*

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) ..... *passim*

Dunlop v. United States, 165 U.S. 486 (1897) 36

Early v. Packer, 537 U.S. 3 (2002) 40, 41, 45

Eddings v. Oklahoma, 455 U.S. 104 (1982) 35

Flournoy v. Wiener, 321 U.S. 253 (1944) 25

Gaskins v. McKellar, 916 F.2d 941 (4th Cir. 1990) 27

TABLE OF AUTHORITIES – Continued

Page

General Talking Pictures Corp. v. W. Electrical Co., 304 U.S. 175 (1938) 21

Godfrey v. Georgia, 446 U.S. 420 (1980) 41

Hayes v. Lockhart, 852 F.2d 339 (8th Cir. 1988) 27

Irvine v. California, 347 U.S. 128 (1954) 22

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1994) 22, 25

Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991) 27

Lawrence v. Florida, ___ S.Ct. ___, 2007 WL 505922 (Feb. 20, 2007) 39

Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991) 27

Lindh v. Murphy, 521 U.S. 320 (1997) 39

Lockett v. Ohio, 438 U.S. 586 (1978) 35

Lockhart v. Fretwell, 506 U.S. 364 (1993) 40

Lockyer v. Andrade, 538 U.S. 63 (2003) 26, 42

Mazer v. Stein, 347 U.S. 201 (1954) 25

Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) 16

Newlon v. Armontrout, 693 F. Supp. 799 (W.D. Mo. 1998) 1, 15, 39

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) 16, 36, 38, 45

Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995) 27

Norfolk Southern Railway Co. v. Sorrell, 127 S. Ct. 799 (2007) 21

Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) 21

TABLE OF AUTHORITIES – Continued

Page

Okla. Tax Committee v. Chickasaw Nation, 515 U.S. 450 (1995) 21

Penry v. Lynaugh, 492 U.S. 302 (1989) 35

Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987) 27

Romano v. Oklahoma, 512 U.S. 1 (1994) ... 16, 21, 24, 26, 27

Satterwhite v. Texas, 486 U.S. 249 (1988) 31

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999) 1, 16, 36

Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994) 27

Smith v. Black, 904 F.2d 950 (5th Cir. 1990) 27

Smith v. Mitchell, 348 F.3d 177 (6th Cir. 2003) 27

Strickland v. Washington, 466 U.S. 688 (1984) 40, 42, 43

Sublett v. Dormire, 217 F.3d 598 (8th Cir. 2000) 16

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 22

Turner v. Murray, 476 U.S. 28 (1986) 31

United States v. Johnson, 968 F.2d 768 (8th Cir. 1992) 16

United States v. Young, 470 U.S. 1 (1985) 32, 33, 34, 35, 38

Viereck v. United States, 318 U.S. 236 (1943) 16, 34, 38

Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001) 14

Weaver v. Bowersox, 438 F.2d 832 (8th Cir. 2006) 14

Weaver v. Missouri, 519 U.S. 856 (1996) 39

Wiggins v. Smith, 539 U.S. 510 (2003) 41, 43

Williams v. Chrans, 945 F.2d 926 (7th Cir. 1991) 27

Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988) 27

TABLE OF AUTHORITIES – Continued

Page

Williams v. Taylor, 529 U.S. 362 (2000) 39, 40, 43, 47

Woodford v. Visciotti, 537 U.S. 19 (2002).....41, 45

Woodson v. North Carolina, 420 U.S. 280 (1976)..... 35

Yarborough v. Alvarado, 541 U.S. 652 (2004) 26, 42

Yee v. Escondido, 503 U.S. 519 (1992) 22

Zant v. Stephens, 462 U.S. 862 (1983)..... 24

STATE CASES

Bennett v. State, 901 P.2d 676 (Nev. 1995) 27

Evans v. State, 637 A.2d 117 (Md. 1994) 27

Henderson v. State, 583 So. 2d 276 (Ala. 1990)..... 27

People v. Miranda, 744 P.2d 1127 (Cal. 1987) 27

People v. Spreitzer, 525 N.E.2d 30 (Ill. 1988) 27

Pickney v. State, 538 So. 2d 329 (Miss. 1988)..... 27

State v. Bell, 393 S.E.2d 364 (S.C. 1990)..... 27

State v. Clayton, 995 S.W.2d 468 (Mo. 1999)..... 9

State v. Compton, 716 P.2d 837 (N.M. 1986) 27

State v. Compton, 39 P.3d 833 (Or. 2002) 27

State v. Hill, 661 N.E.2d 1068 (Ohio 1996) 27

State v. Irick, 762 S.W.2d 121 (Tenn. 1988)..... 27

State v. Koedatich, 548 A.2d 939 (N.J. 1988)..... 27

State v. Lawrie, No. IK92-08-0180, 1995 WL 818511 (Del. Nov. 28, 1995) 27

State v. Ramsey, 864 S.W.2d 320 (Mo. 1993)..... 27

TABLE OF AUTHORITIES – Continued

Page

State v. Reynolds, 836 A.2d 224 (Conn. 2003) 27

State v. Rose, 451 S.E.2d 211 (N.C. 1994) 27

State v. Walden, 905 P.2d 974 (Ariz. 1995) 27

State v. Weaver, 912 S.W.2d 499 (Mo. 1996) 12

Stouffer v. State, 738 P.2d 1349 (Okla.Crim. App. 1987) 27

Templeman v. Commonwealth, 785 S.W.2d 259 (Ky. 1990) 27

DOCKETED CASES

Weaver v. Bowersox, No. 4:96-CV-2220 ..... 1, 14

Weaver v. Bowersox, No. 4:96-CV-774 39

FEDERAL STATUTES

28 U.S.C. § 2254(d)(1) ..... *passim*

COURT RULES

Supreme Court Rule 14 ..... 21, 22

RESPONDENT'S STATEMENT OF THE CASE

Prosecuting Attorney George "Buzz" Westfall gave his penalty-phase closing argument in this case just weeks after the United States District Court for the Eastern District of Missouri granted habeas corpus relief in another capital case he had prosecuted. *Newlon v. Armontrout*, 693 F. Supp. 799 (W.D. Mo. 1998), *aff'd*, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). In *Newlon*, the district court held that Westfall's numerous improper sentencing arguments violated the Eighth and Fourteenth Amendments. *Id.* At William Weaver's state post-conviction hearing, Westfall acknowledged he had been aware of the *Newlon* decision at the time of Weaver's trial. *Weaver v. Bowersox*, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003), Pet. App. A-51, n.5. Yet, Westfall's sentencing argument in Weaver's case closely tracked his *Newlon* summation and contained many of the same themes and comments that he had been warned were unconstitutional.[1]

I. WESTFALL'S PENALTY-PHASE CLOSING ARGUMENTS.

Westfall began his closing argument on penalty by asserting that "the State's case [for guilt] . . . , once you thr[o]w out all the smoke screens and evaluated his perjury that his people put on, his guilt was obvious." Pet. App. A-275.[2] Next Westfall made the first in a series of

---

[1] Newlon was subsequently sentenced to life imprisonment. Westfall also prosecuted Weaver's co-indictee, Daryl Shurn. His penalty-phase summation in Shurn's case mirrored the arguments in Newlon's and Weaver's cases. The Eighth Circuit granted relief in Shurn's case, holding that Westfall's argument violated Shurn's Eighth and Fourteenth Amendment rights. *Shurn v. Delo*, 177 F.3d 662 (8th Cir.), *cert. denied*, 528 U.S. 1010 (1999). Shurn was subsequently resentenced to life imprisonment.

[2] Westfall's penalty-phase summation had been foreshadowed by a guilt-phase closing argument whose primary theme was that Mr.

(Continued on following page)

comments purporting to draw on his experience and responsibilities as the elected prosecuting attorney to instruct the jury that a death sentence was appropriate for William Weaver:

> I know what my responsibilities are and I know what the right punishment is in this case. So, if I'm wasting my time [in asking the jurors to impose the death penalty], I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here.

Pet. App. A-276.

He then turned to a theme that would permeate his opening and rebuttal arguments:

> You've got to remember what we're dealing with here. This is bigger than William Weaver. It's bigger than Daryl Shurn. It's bigger than all of us. . . . It's the crime that strikes right at the core of our society. It scares us all. The execution of witnesses in a Federal Drug case.

Pet. App. A-276-77. Defense counsel's objection was overruled, and Westfall continued:

> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the William Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Pet. App. A-277.

Weaver's trial counsel, Doris Black, fabricated evidence and suborned perjury. *See, e.g.*, Tr. 1645; 1647; 1649-50; 1658; 1664.

Westfall then turned to another central theme of his closing argument, that jurors, like soldiers, sometimes had a "duty" to "kill."

> Sometimes killing is not only fair and justified, it's right. Sometimes its [sic] your duty. There are times you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well it was right to kill then and it's right to kill him now.

Id. As an added reason for this rightness, Westfall went on to speculate that Weaver would have killed more people if he had not run out of bullets. Pet. App. A-281. Trial counsel's objection that there was no basis in the record for such an argument was overruled. *Id.*

Westfall then offered a variation on his earlier comments regarding the jurors' "duty" to "kill," this time turning "duty" into what he called juror "courage:"

> There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society where we can walk our streets and protect our property. Sometimes you have to be harder than they are. And this is the kind of case where you're going to have to return that sort of a sentence. . . . You've got to give the message to the Shurns and the Weavers of the world that we just won't tolerate it and we have got the guts to do it and we have got the backbone to do it. . . .

Pet. App. A-282-83. Shortly thereafter, Westfall repeated his "guts" refrain: "I hope you're going to do it. I hope you've got the guts to do it." A-285.

Westfall finished his opening penalty summation by urging the jury to focus not on Weaver as an individual, but on fighting drug dealers:

> This case – I guess it's one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.
>
> . . . [Y]ou've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

Pet. App. A-285-86.

After defense counsel finished her closing remarks, Westfall's final summation recapitulated most of the themes from his first summation. He began by "beg[ging]" again for a message to "the drug dealers, the dope peddlers and the hit men they hire:"

> And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world?

Pet. App. A-292-93.

Westfall reiterated Weaver's own lack of significance:

> The one thing you've got to get into your head, this is far more important than William Weaver.

> This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

Pet. App. A-293-94. Returning to yet another theme in his initial argument, Westfall added, "quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty." Pet. App. A-294. Defense counsel's objection was sustained. *Id.*

After discussing deterrence, telling the jurors again that they "need to think beyond William Weaver," *id.* at A-295, and arguing that the defendant had shown no remorse, *id.* at A-296, Westfall once more called on his authority and experience as the elected prosecutor: "It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." Pet. App. A-297. Defense counsel's objection was sustained, and the court instructed the jury to disregard the comment, *id.* at A-298, but Westfall persisted, asking

> If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach

> over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do.

Defense counsel objected and was overruled. Pet. App. A-298-99. Westfall concluded:

> He [Patton] said, "You'll know what to do." Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with your brain and you made the right decision. Today, you've got to reach down into your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we sentence you to die. You know what to do. Please have the courage to do it. Thank you.

Pet. App. A-299.

II. DEFENSE COUNSEL'S SUMMATION.

Defense counsel stressed four factors favoring a sentence of life imprisonment without parole: Weaver's relationship with his family and his good character,[3] his adaptability to incarceration,[4] the fact that a life sentence was consistent with the jury's duty to do justice,[5] and the

---

[3] *See, e.g.,* Pet. App. A-290: "[Y]ou can consider whether the defendant has two children and a mother in failing health. . . . [Y]ou may consider whether he's worked with young people to encourage them against engaging in crime and using drugs. . . . Is there something salvageable about this human being? And everybody who has spoken has said about William Weaver there's something salvageable. There is good in him."

[4] *See, e.g.,* Pet. App. A-291: "[Y]ou may consider . . . what he's done in jail. He's helped them to read and write . . . But he can reach somebody in that penitentiary. . . . A William Weaver can reach them. . . . And the men respect him. He's stopped fights."

[5] *See* Pet. App. A-292: "[B]ut if you vote for life, you are still doing your duty."

possibility that the jurors had made a mistake in finding Weaver guilty.[6] She also responded briefly to Westfall's argument that the jury should sentence Weaver to death to send a message to drug dealers, suggesting that a life sentence would send a sufficient message. Pet. App. A-292.

III. THE TRIAL COURT'S INSTRUCTIONS.

The trial court submitted to the jury four alleged aggravating factors and eight alleged mitigating circumstances.[7] It instructed that the jury must return a verdict

---

[6] *See, e.g.*, Pet. App. A-288: "But what if you're wrong you see? And there is that possibility that you're wrong because you are human, too." (As indicated in note 9 *infra*, Missouri practice recognizes residual doubt as a permissible argument in appropriate cases.)

[7] The aggravating circumstances were: (1) whether the defendant murdered Charles Taylor for the purpose of the defendant receiving money or any other thing of value from Charles Taylor or another person; (2) whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor; (3) whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman; and (4) whether Charles Taylor was a potential witness in pending prosecutions of Charles Shurn, and/or Larry Shurn in Federal Court and was killed as a result of his status as a potential witness. Pet. App. A-306. The jury found three of the four, declining to find murder for the purpose of receiving money.

The trial court found that Weaver's evidence supported the submission of the following mitigating circumstances: (1) whether the defendant has no significant history of prior criminal activity; (2) whether the defendant was an accomplice in the murder of Charles Taylor and whether his participation was relatively minor; (3) whether the defendant acted as an accomplice and was not the trigger man; (4) whether the defendant has two young children and has a mother in failing health; (5) whether the defendant has worked with young people in encouraging them to stay out of trouble and avoid drugs; (6) whether the defendant, after his incarceration, has worked with inmates in teaching them reading and language skills, and assists inmates with disabilities; (7) whether the defendant, since his incarceration, has been given responsibilities of trustee, indicating traits of character showing cooperation, helpfulness and a willingness to work within the confines

(Continued on following page)

of life imprisonment unless it found that (a) at least one of the aggravating circumstances had been proven beyond a reasonable doubt, Pet. App. A-305; (b) the aggravating circumstance(s) were sufficient to warrant the imposition of the death penalty, Pet. App. A-306; and (c) the aggravating circumstances outweighed the mitigating circumstances. Pet. App. A-307-08. It explained that, regardless of how the jurors weighed the aggravating circumstances, the final decision regarding the appropriate punishment was theirs to make. Pet. App. A-309.

The court's only instruction bearing on Westfall's arguments was a generic, unelaborated admonition that the arguments of counsel are not evidence. Pet. App. A-312.

IV. THE EVIDENCE BEFORE THE JURY AT THE TIME OF WESTFALL'S ARGUMENT.

A. The Guilt-Phase Evidence

Weaver was prosecuted on the theory that he and co-indictee, Daryl Shurn, killed Taylor to prevent Taylor from testifying against Shurn's brother in an imminent drug prosecution. Taylor was a drug user who acted as a "straw" purchaser, holding property in his name paid for by the Shurn brothers and used in their drug enterprise. Tr. 1047-48. After Taylor was shot, his two assailants drove away; their car was stopped several minutes later by police, who apprehended its driver, Daryl Shurn, Tr. 741. An officer observed a passenger fleeing into a nearby wooded area. Tr. 745.

The prosecution's case that Weaver was the passenger – and hence the second assailant – had three aspects. First, there was some eyewitness testimony. Individuals who saw the murder recalled that the clothing worn by one of the killers was similar to what Weaver was wearing

---

of authority; and (8) any circumstances which you find from the evidence in mitigation of punishment. Pet. App. A-307-08.

at the time he was apprehended;[8] and the officer who arrested Shurn identified Weaver at trial as the passenger who escaped. Tr. 755. Second, there was Weaver's proximity to the crime: he was stopped and arrested by a police officer when he was seen jogging without shoes in a nearby neighborhood. Tr. 806-08. Third, jailhouse informant, Robert "Dutch" Tabler, provided the previously missing connection between Shurn and Weaver through his testimony that Weaver told Tabler that he was a "hit man" for the Shurns, that he shot Taylor, and that he later threw the gun out of the car. Tr. 989.

The Warden asserts that "the State's case for the death penalty was particularly strong." Pet'r. Br. at 27. Because Weaver's trial counsel relied in part upon residual doubt concerning Weaver's guilt, a factor which Missouri juries are permitted to consider as a basis for refraining from a death sentence,[9] it bears note that the state's case at the guilt phase was not at all open and shut. Both on cross-examination and during the defense case-in-chief, Weaver's counsel pointed out deficiencies in the identification evidence.[10] Counsel also elicited evidence that Weaver

---

[8] *See, e.g.*, Tr. 645, 665.

[9] In Missouri, in appropriate cases it is standard practice to argue residual doubt as a ground for a sentence less than death. *See, e.g., State v. Clayton*, 995 S.W.2d 468, 478 (Mo. 1999). Weaver's jury was instructed that in determining whether the circumstances warranted imposition of the death penalty and in weighing those circumstances, it was to consider "[a]ll of the evidence relating to the murder of Charles Taylor," Pet. App. A-306-07, and that in determining whether death was the appropriate punishment, the jury was to consider "all the circumstances" of the case. *Id.* at A-309.

[10] Several of the eyewitnesses testified that the man they saw with Daryl Shurn that day wore "darkish red" (Tr. 646), "maroon" (Tr. 665) or "burgundy" clothing. Tr. 665. When Weaver was stopped by the police shortly after Taylor was shot, he was wearing a pink shirt and pink and blue shorts. Tr. 809. Moreover, several witnesses insisted that the man they saw running had on long pants. *See, e.g.*, Tr. 1147; 1150; 1595. And

(Continued on following page)

made no attempt to run when the officer asked him to stop, and that Weaver gave the officer his correct name and address. Tr. 807. Weaver did not have a weapon (Tr. 789); no gunpowder residue was found on his hands (Tr. 950); and, his fingerprints were not found in Shurn's car. Tr. 957. In addition, the federal prosecutors called by the state to establish the connection between Shurn and Taylor were obliged to admit that Weaver's name never surfaced in their investigation and that they had no evidence he was involved in the drug trade. Tr. 1038. Defense counsel impeached jailhouse informant Tabler as a convicted rapist and methamphetamine user facing eighteen years in prison who had made a deal with the prosecution in Weaver's case to cut his incarceration to approximately fourteen to eighteen months. Tr. 989-90, 996-97, 1000.[11] Weaver presented an explanation for his location and activity at the time of arrest which, though strange, was corroborated.[12] He also called character witnesses to attest to his nonviolent nature and his involvement in anti-drug educational programs. Tr. 1177; 1181; 1189.

---

the police officer's identification of Weaver as the man who fled from Shurn's car was originally made in a one person "show up." Tr. 755.

[11] Several inmate witnesses called by the defense testified that Tabler told them he would say or do "anything" to get out from under the pending charges. *See, e.g.*, Tr. 1246; 1259. The inmates also testified that numerous jail prisoners were in and out of Weaver's cell because it was the only one with a window. Tr. 1244. Thus, they testified that Tabler could easily have obtained the information he related to the jury from Weaver's legal papers, which were in plain view in Weaver's cell. *Id.*

[12] Weaver testified that he was near the Mansion Hills complex that morning for an illicit sexual encounter, but when the woman failed to appear, he went jogging. Tr. 1328. Leslie Cunningham confirmed under oath that she was supposed to meet Weaver at her godfather's Mansion Hill residence at 7:00 a.m. but was late. Tr. 1230. She also testified that when she did arrive, she left because she saw police cars and she had no driver's license. *Id.*

B. The Penalty-Phase Evidence.

The state presented no evidence at the sentencing phase of the trial. Tr. 1729. Weaver presented a number of witnesses to establish that he was a person of good character, that he had no significant prior record, and that he would be a positive influence in the prison system, as well as to suggest that his guilt was not a certainty.

Debra Jones testified that Weaver had been "like a father" and an "inspiration" to her son and "others in community." Tr. 1730. Arlene Simpson told the jurors that Weaver had "always tried to influence people . . . to walk a straight line." Tr. 1733. His aunt, Mary Wrice, testified that he was a "very good son" and "very respectful." Tr. 1735-36. A local Lutheran minister, Reverend Schroeder, discussed a number of "very positive experiences" with Weaver in conjunction with programs for neighborhood youth. Tr. 1737. Schroeder also recounted his ongoing involvement with Weaver after Weaver's arrest, and he expressed confidence that Weaver could be a "very positive person in the prison population." *Id.* at 1738. Weaver's father told the jury how Weaver helped look after his ailing mother, and that Weaver was a good father to his two children. Tr. 1742-43. Weaver testified again, reaffirming his innocence but also describing how he had gone back to school, obtained his GED, completed a program at a local business college, and obtained a communications license. Tr. 1744-46. He discussed his work with young people in the community, his work in the county jail infirmary, and his teaching other inmates to read and spell. Tr. 1751-53. He also informed the jurors that he had one prior misdemeanor conviction. Tr. 1754.

V. STATE-COURT DECISION OF WEAVER'S DUE PROCESS CLAIM.

After the jury returned a death verdict,Weaver filed a motion for postconviction relief, which the trial court denied. Weaver then filed a consolidated appeal in the

Missouri Supreme Court.[13] He raised a number of claims,[14] but his primary contention was that Westfall made numerous improper and prejudicial comments during his summations at both phases of the capital trial and that the arguments individually and collectively violated the Eighth and Fourteenth Amendments. J.A. 44-61.

Weaver argued that virtually the entire penalty-phase argument was improper. He contended that Westfall made impermissible comments emphasizing his authority and expertise as the elected prosecuting attorney, which implicitly and explicitly urged the jury to defer to his judgment that death was the appropriate punishment; that Westfall improperly implied that defense counsel had suborned perjury and fabricated evidence; that Westfall improperly argued matters outside the record or not supported by the record; that Westfall improperly urged the jury to impose death regardless of whether Weaver individually deserved it, in order to send a message and protect the community; and that Westfall made comments calculated to arouse the jurors' fears and biases. J.A. 46-61.

The Missouri Supreme Court rejected these arguments. Making no reference to the constitutional bases of Weaver's claims, it evaluated them under the state-law rule that "[t]he trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted." *State v. Weaver*, 912 S.W.2d 499, 512 (Mo.

---

[13] At that time, Missouri had a unitary system in which the post-conviction appeal and the direct appeal were heard by the state supreme court in a consolidated proceeding.

[14] For example, Weaver maintained that he was entitled to a new trial because Westfall's investigator, Lawrence Freeman, "posed as a juror, wore a juror button, and mingled with the venire panel" during jury selection. Pet. App. A-230. The state court concluded that "Freeman's conduct was thoughtless, if not bizarre," urged that he be "admonished," but concluded that Weaver had not demonstrated any prejudice. *Id.* at A-231.

1996); Pet. App. A-232.[15] The court addressed only a few of Weaver's specific contentions. Regarding the contention that Westfall improperly emphasized his special authority as the elected prosecutor in asking the jury to accept his judgment that death was the right punishment for Weaver, the court recognized that some of Westfall's rhetorical techniques "may seem flamboyant, if not somewhat abrasive, to a juror's ears." *Id.* Nevertheless, it concluded that they were "for the most part, a fair comment on the strength of the case," and it noted that the trial court had sustained objections to some of the arguments and directed the jury to disregard them. *Id.*[16] Regarding Weaver's challenge to Westfall's attacks on defense counsel, the court dismissed them as "[a]t most, . . . near error which, by definition, is not error." *Id.* at A-236. It then concluded:

> Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would also have shot the witness. Finally, he argued that the death penalty would be

---

[15] For this proposition, the court cited an earlier Missouri case that in turn cited only state-law precedents and did not address any federal constitutional objection to the prosecutor's argument, *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo. 1982).

[16] Weaver separately alleged that trial counsel's failure to object to some of Westfall's arguments violated his Sixth Amendment right to the effective assistance of counsel. The Missouri Supreme Court rejected that contention because a "review of the record discloses that defense counsel objected vehemently to almost all of the arguments complained of here and several of the objections were sustained followed by curative instructions to the jury." Pet. App. A-232.

> a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. . . . The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

Id. at A-236-37.

VI. FEDERAL COURT PROCEEDINGS.

Weaver filed a petition for habeas corpus in the United States District Court for the Eastern District of Missouri. After initially granting relief on another issue,[17] the district court determined that several of Westfall's individual comments and the penalty-phase argument as a whole violated the Eighth and Fourteenth Amendments, and that the Missouri Supreme Court's approval of the arguments was contrary to and involved an unreasonable application of clearly established federal law. *Weaver v. Bowersox*, No. 4-96-CV-2220 (CAS) (E. D. Mo. May 7, 2003).

A divided panel of the Eighth Circuit affirmed. *Weaver v. Bowersox*, 438 F.3d 832, 842 (8th Cir. 2006); Pet. App. A-2. The majority opinion, written by Judge Melloy, identified this Court's precedents as the source for the governing due process standard: "A prosecutor's argument violates due process if it 'infect[s] the trial with unfairness.'" Pet.

---

[17] The district court first concluded that Westfall exercised his peremptory challenges in a racially discriminatory manner in violation of this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Weaver v. Bowersox*, No. 4:96-CV-2220 (CAS) (E. D. Mo. July 1, 1996); Pet. App. A-203. The district court determined that Westfall's purported reason for striking one potential juror ("I was not persuaded she could give the death penalty, particularly to a black person") was "clearly not race neutral and that Weaver has met his overall burden of proving discrimination." *Id.* at A-210. A divided panel of the Eighth Circuit reversed, reasoning that the state court's resolution of Weaver's claim was consistent with "the dual motivation analysis that we have recognized." *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001); Pet. App. A-200.

App. A-12 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). It explained that the application of this rule requires attention to the totality of the circumstances, and it summarized the established methodology "[to] determine if a prosecutor's statement infected Weaver's trial with unfairness:"

> [T]he court must: (1) Measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his [or her] argument to minimize prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all the aggravating and mitigating circumstances.

Id. at A-12.

The majority then identified the following five categories into which the challenged prosecutorial arguments fell:

> (1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should "kill [Weaver] now").

Id. at A-13. It found that the arguments in the first category – that the jurors, like "soldiers" in wartime, had a "duty" to sentence Weaver to death – violated the Eighth Amendment. *Id.* (citing *Newlon*, *supra*, where the Eighth Circuit granted habeas relief on the basis of similar improper arguments by Westfall). The majority found that

the arguments in categories 2, 4, and 5 – Westfall's interjection of his personal judgment that Weaver deserved death, his invocation of his official position of authority to bolster that judgment, and his effort to evoke the jurors' emotional reactions – "are improperly inflammatory under several existing United States Supreme Court precedents." Pet. App. A-14.[18] It found that the third category of arguments, those insisting that Weaver's execution was essential to further society's "war on drugs," violated both the Eighth Amendment, *id.* (citing a half-dozen of this Court's opinions dealing with the prohibition of arbitrariness and with the requirement of individualization in capital sentencing), and the Due Process Clause. *Id.* at A-15 (citing Eighth Circuit decisions which in turn cited this Court's principal cases dealing with due process restrictions on prosecutorial argument).[19]

Finally, having concluded that "[t]here is little doubt that the prosecutor's statements are such that we would certainly grant relief without applying AEDPA," the majority turned to the "closer" question posed by § 2254(d): "[W]hether the state court made an unreasonable interpretation of federal law as required by AEDPA."

---

[18] The opinion at this point cites three Eighth Circuit decisions – *Miller v. Lockhart*, 65 F.3d 676, 684-85 (8th Cir. 1995), *Newlon*, 885 F.2d at 1335-37, and *Shurn*, 177 F.3d 667-69 (Wollman, J., concurring). Two of those decisions cited and followed the leading due process precedent from this Court. *Miller* quoted and applied the due process rule of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Newlon* relied upon both *Donnelly* and *Darden v. Wainwright*, 477 U.S. 168, 179 (1986). *Shurn* and *Newlon* involved very similar arguments made by Westfall.

[19] *Sublett v. Dormire*, 217 F.3d 598 (8th Cir. 2000), relies on *Donnelly* and *Darden*; *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), relies on *Donnelly*, *Darden*, and *Romano v. Oklahoma*, 512 U.S. 1 (1994); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992), relies on *Berger v. United States*, 295 U.S. 78, 85 (1935), and *Viereck v. United States*, 318 U.S. 236 (1943).

Id. The sheer magnitude of the impropriety of the prosecutor's arguments dictated the answer:

> The conclusion by the Missouri Supreme Court that "the penalty phase arguments . . . [were] reasonable" is unreasonable under existing United States Supreme Court precedents. It is unclear which precedents the Missouri Supreme Court applied. Regardless, there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents. As a result, AEDPA does not bar relief in the present matter.

Id. at A-15-16.[20]

SUMMARY OF ARGUMENT

The Warden's Brief on the Merits reveals that, for two independent reasons, the writ of certiorari was improvidently granted and should be dismissed. First, the only ground that the Warden urges for reversal is radically at odds with the single question presented in his petition for certiorari. Indeed, the Warden's merits brief openly concedes that the premise of his Question Presented is false.

---

[20] Judge Bye agreed with Judge Melloy that "Weaver's claims warrant habeas relief even if AEDPA's strict standard of review applies." 438 F.3d at 842. But he also wrote separately to express his view that § 2254(d) did not apply. While he accepted that a "summary" state court decision can constitute an adjudication on the merits for purposes of § 2254(d), Judge Bye urged that "a distinction must be drawn between summarily disposing of a claim and wholly ignoring it." Pet. App. A-19. Judge Bye explained that "[t]he state court opinion discusses only the first three of the six arguments advanced by Weaver" in claim IV.C. of his state-court brief. *Id.* Judge Bowman concurred in Judge Melloy's finding that § 2254(d) applied to this case, but dissented from the judgment granting Weaver relief. Although he did acknowledge that "[w]ere it not for the AEDPA standard of review, I might agree with the result reached by the Court today." Pet. App. A-21.

Second, although the Eighth Circuit held that some of Westfall's arguments violated the Due Process Clause of the Fourteenth Amendment and that others violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, the Warden's merits brief now makes clear that he is challenging only the former. Thus, any decision this Court could issue would be strictly advisory, and would have no impact on the Eighth Circuit's judgment.

On the merits, the Eighth Circuit's ruling that Westfall's penalty-phase closing arguments violated the due process standard established by *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Darden v. Wainwright*, 477 U.S. 168 (1986), was correct. Considered in their totality and in the context of the record as a whole, Westfall's arguments were riddled with improprieties that offended an array of interests protected by the Due Process Clause. Westfall invoked his authority as elected prosecuting attorney and implied that this gave him special knowledge that Weaver's case was particularly deserving of a death sentence. He told the jurors that their job was not to consider Weaver as an individual but to make Weaver's sentence serve the larger purpose of sending a message to drug-dealing scum and their minions. He told the jurors they were soldiers bound by duty to return a death verdict. He invoked a cinematic General Patton exhorting soldiers that when their buddy's face erupted in a "pile of goo" they would "know what to do," and made other inflammatory appeals to raw emotion. He argued factual matters not supported by the record and made coded allusions to Weaver's race as a factor in favor of death. This performance was not simply outrageous according to every precept concerning prosecutorial arguments that this Court has ever endorsed; it was calculated to subvert the rationality of the capital sentencing process and to produce a death sentence that was the product of pure passion.

Westfall's conduct was all the more egregious because it was premeditated. He had used many of these arguments twice before in capital trials, and he was admittedly aware that they had recently been found unconstitutional by a federal court. His conduct was no inadvertent slip into occasional excesses but implemented a deliberate, unrelieved, persistent strategy to excite the jury's temper and release its judgment from the discipline of facts and law. This argument was not invited by defense counsel's closing remarks nor was it effectively cauterized by them. Although the trial court did instruct the jury that arguments were not evidence and did sustain a handful of defense counsel's objections, neither action stemmed or corrected the torrent of offensive exhortation. Finally, because the prosecution's case for death was not particularly strong on the facts, and because Weaver presented substantial mitigating evidence, there is every reason to believe the jury's verdict was affected by the prosecutor's improper arguments.

The Eighth Circuit was also correct to conclude that the Missouri Supreme Court's decision rejecting Weaver's due process claim involved an unreasonable application of clearly established federal law. This Court's precedents require a reviewing court to examine the totality of the circumstances and to consider a well-defined set of factors bearing upon the due process issue. The state court's opinion shows not only that it omitted critical portions of the record from its analysis, but that it failed to consider any of the factors this Court's decisions have identified as important. Had the state court applied this Court's decisions – or even a reasonable facsimile of the analytic process this Court's decisions illustrate – it could not reasonably have escaped the conclusion that Weaver's due process rights were violated on this record.

ARGUMENT

I. FOR TWO DISTINCT REASONS, CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

A. The Only Ground for Reversal Now Advanced by the Warden is Outside and Irreconcilable with the Question Presented.

The petition for certiorari in this case presented a single question:

> Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

Pet. at i. The explicit premise of the question was that this Court's precedents addressing due process challenges to prosecutorial closing arguments at the guilt-or-innocence phase of a trial do not establish a rule of decision applicable to the penalty phase of a capital case. *See id.* at 8 ("No Supreme Court authority addresses the constitutionality of the prosecutor's penalty phase closing argument like the one presented by the prosecutor in the present case."). The petition's question thus asked whether – in the absence of any relevant "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)) – the Eighth Circuit erred in overturning a Missouri Supreme Court decision finding no due process violation in a prosecutor's penalty-phase closing argument. And the petition's answer was framed in those terms: "The panel dissent properly concluded that the state court's resolution of the penalty phase argument is reasonable given the lack of clearly established Supreme Court precedent." *Id.* at 13.

The Warden has now abandoned that argument. Instead, his brief on the merits affirmatively embraces the very proposition denied in the question presented and the body of the petition: that there *are* precedents from this Court providing "clearly established federal law" governing Weaver's due process claim. As the Warden now puts it, "[t]he 'clearly established Federal law' applicable to [Respondent's] ... claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994)." Pet'r. Br. at 20; *see id.* at 20-22. The Warden's argument now is merely that, on the particular facts of this case, the court of appeals misapplied this Court's concededly governing precedents. *See, e.g., id.* at 23 (arguing that on the facts the Missouri Supreme Court's decision "is wholly consistent with *Donnelly*, *Darden*, and *Romano*"). Having won a grant of certiorari by purporting to present a broad question of national significance, the Warden's brief on the merits submits nothing more than a request to review a fact-bound decision of a lower court.

Such bait-and-switch tactics are directly contrary to this Court's rules. Specifically, Supreme Court Rule 14.1(a) instructs that on certiorari, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This Rule codifies the well-established principle that "[o]ne having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue." *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175, 179 (1938). *See, e.g., Norfolk So. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 804-05 (2007) ("We are typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari"); *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998) (refusing to allow petitioners to raise arguments outside the questions presented in the petition); *Okla. Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) (stating that the Court will only entertain issues withheld until merits briefing "in the most exceptional circumstances");

Chandris, Inc. v. Latsis, 515 U.S. 347, 353 (1995) (declining to consider an argument made for the first time in the opening brief); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1994) (per curiam) (dismissing the writ as improvidently granted because the Court could not reach the merits of the case without considering issues not raised in the petition); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (declining to consider an argument not made in the petition); *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (stating that the Court will disregard Rule 14.1(a) "only in the most exceptional cases"); *American Nat'l Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (per curiam) (refusing to consider a question not presented in the petition for certiorari); *Irvine v. California*, 347 U.S. 128, 129 (1954) (opinion of Jackson, J.) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari").

As this Court has explained, Rule 14.1(a) "serves two important and related purposes." *Yee*, 503 U.S. at 535. By insisting that the petition's questions presented fairly define the issues to be argued, it helps the Court to select for plenary review only those cases that truly present apt vehicles for review of important federal questions. *Id.* at 536. And when a petition does not present a case of that sort, the Rule assures the respondent of an opportunity to "sharpen the arguments as to why certiorari should not be granted." *Id.*; *see also Taylor*, 503 U.S. at 646 ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system"). The Warden has frustrated both of those purposes here. After misleading both the Court and Respondent about his intended argument at the certiorari stage, the Warden now seeks to foist upon the Court a purely fact-bound, record-specific question of no general consequence. The Court should not tolerate such a subterfuge. It should dismiss the writ as improvidently granted.

B. The Decision of the Court of Appeals Rests on Two Independent Grounds, and the Warden Has Challenged Only One of Them.

The judgment of the court of appeals rests on two independent grounds. The court concluded that some of the prosecutor's statements during his penalty-phase closing argument violated the Due Process Clause of the Fourteenth Amendment and that others violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[21] The two categories of statements the court found to violate the Eighth Amendment were the statement "that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill," and "statements that executing [Respondent] was necessary to sustain a societal effort as part of the 'war on drugs.'" Pet. App. A-13-14.[22] Those Eighth Amendment holdings are

---

[21] Of course, the Eighth Amendment applies to the States by virtue of its incorporation into the Fourteenth Amendment's Due Process Clause. But the substance of Eighth Amendment rules and due process rules remain distinct, and we follow the Court's convention of referring to claims invoking those rules as Eighth Amendment claims and due process claims respectively. Later in this brief we will note that, under the Court's cases, a due process analysis may include some consideration of whether the prosecutor's statements "implicate[d] other specific [constitutional] rights." *Darden*, 477 U.S. at 182. In this case, the other rights implicated by the prosecutor's statements included rights under the Eighth Amendment. But the due process analysis cannot require a showing that the statements in question separately violated – as opposed to "implicating" – some other provision. If it did, the due process analysis would be superfluous. And in this case, the court of appeals went far beyond suggesting that the prosecutor's statements raised Eighth Amendment concerns. It explicitly held that two of the five categories of prosecutorial statements violated the Eighth Amendment – a holding that constituted a separate and independent ground for relief.

[22] As to Westfall's analogy between soldiers and jurors, the court concluded:

> Describing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the

(Continued on following page)

independent of the court's conclusion that three other sets of prosecutorial arguments violated due process. *See id.* at 13-15.

At the petition phase, it was not entirely clear whether the Warden intended to challenge both grounds of the court of appeals' decision or only the due process ground. The question presented referred only to due process, *see* Pet. at i, but the "Constitutional and Statutory Provisions Involved" listed both the Due Process Clause and the Eighth Amendment, *id.* at 1. The Warden's brief on the merits, however, makes it abundantly clear that the petition was not intended to contest the lower court's Eighth Amendment ruling. Like the petition, the merits brief's recitation of the question presented continues to focus only on due process. *See* Pet'r Br. i. But unlike the petition, the brief's list of "Constitutional and Statutory Provisions Involved" now omits any mention of the Eighth Amendment. *Id.* at 2. And the Warden's actual argument is based entirely on due process. *See, e.g., id.* at 20, 22, 23, 28 (identifying the Court's due process precedents in *Donnelly*, *Darden*, and *Romano* as establishing the relevant clearly established law, arguing that the Missouri Supreme Court's decision was not contrary to or an unreasonable application of those precedents, and contending that the court of appeals erred in concluding to the

---

Eighth Amendment. *See Zant v. Stephens*, 462 U.S. 862, 879 (1983). Not only was the main thrust of the prosecutor's argument diametrically opposed to the requirement that capital sentencing be at the jury's discretion, it also "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985)."

Pet. App. A-13. As to the prosecutor's exhortation to execute Weaver as part of the larger "war on drugs," the court observed that "[t]he controlling Supreme Court precedent is well-settled and longstanding: The Eighth Amendment requires capital sentencing to be an individualized decision-making process." *Id.* at A-14.

contrary). Nowhere does the Warden argue that the Eighth Amendment ground of the court of appeals' decision was wrong either as a matter of this Court's Eighth Amendment precedents or under the restrictions imposed by 28 U.S.C. § 2254(d)(1).[23]

Consequently, nothing the Court says about the due process issue can disturb the judgment of the court of appeals. This Court does "not reach for constitutional questions not raised by the parties." *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954). Its appropriate refusal to address the Eighth Amendment issue in this case will render anything it says about the due process issue wholly advisory. In such circumstances, the appropriate course is to dismiss the writ as improvidently granted. *See Izumi Seimitsu*, 510 U.S. at 34 (dismissing where petitioner appealed only the grant of a vacatur motion and not the denial of a motion to intervene, when each ruling was sufficient to support the judgment below); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109-11 (2001) (dismissing where resolution of the question presented would require a threshold inquiry into issues decided by the court of appeals but not presented in the petition for certiorari); *and see Flournoy v. Wiener*, 321

[23] Although he does not challenge the Eighth Amendment holding below, the Warden does acknowledge it. By the Warden's own account, the court of appeals found two of the five categories of prosecutorial statements in issue to violate the Eighth Amendment, not the Due Process Clause. *See* Pet'r. Br. at 15-16 (summarizing the court's treatment of "category (1)" and "category (3)"). Moreover, the Warden openly concedes the distinctness of the due process and Eighth Amendment issues in the case. *See id.* at 28-29 ("[W]hen the court of appeals did refer to this Court's cases, it frequently referred to cases that did not address due process claims like Weaver's, but Eighth Amendment precedent not directly on point."). The Warden is right that the Eighth Amendment cases relied upon by the Court of Appeals do not address the due process component of Weaver's claims. Instead, they establish an entirely separate ground of relief sufficient to support the judgment below. The Warden leaves that separate ground untouched.

U.S. 253, 261-62 (1944) (dismissing where it was "apparent that the decision of the single question arising under the Fifth Amendment, cannot, in the present state of the record, be dispositive of the case" and an "opinion on the subject would be advisory only"); *cf. Belcher v. Stengel*, 429 U.S. 118, 119-20 (1976) (dismissing the writ as improvidently granted, "[n]ow that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered").

II. THE CLEARLY ESTABLISHED ELEMENTS OF DUE PROCESS IN PROSECUTORIAL CLOSING ARGUMENT.

With respect to claims that state courts have adjudicated on the merits, AEDPA provides that a federal habeas court shall not grant relief unless the state decision "was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Clearly established Federal law excludes "open questions[s] in [this Court's] jurisprudence," *Carey v. Musladin*, 127 S.Ct. 649, 652 (2006), and is limited to "'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)). As the Warden now concedes, Weaver's claim is governed by the clearly established federal law set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994). Pet'r. Br. at 20.[24]

---

[24] This concession may reflect a belated recognition of the consensus among the federal courts of appeals and state courts that *Darden* supplies the rule governing claims of prosecutorial misconduct in penalty-phase argument. *See Bates v. Bell*, 402 F.3d 635, 640-41 (6th

(Continued on following page)

A. The Due Process Standard.

As *Donnelly* first articulated in the context of a non-capital case, improper prosecutorial closing arguments may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." 416 U.S. at 643. *Darden* applied this rule to evaluate the constitutionality of a guilt-phase argument in a capital case. 477 U.S. at 181. And *Romano*, though specifically concerned with a prosecutor's presentation of evidence rather than closing argument, confirmed that *Donnelly* and *Darden* provided the "proper analytic framework" for due process claims based upon potentially prejudicial prosecutorial conduct during the sentencing phase of a capital trial. 512 U.S. at 12.

Cir. 2005); *Smith v. Mitchell*, 348 F.3d 177, 210-11 (6th Cir. 2003); *Bell v. Evatt*, 72 F.3d 421, 436 (4th Cir. 1995); *Nichols v. Scott*, 69 F.3d 1255, 1278 (5th Cir. 1995); *Siripongs v. Calderon*, 35 F.3d 1308, 1319 (9th Cir. 1994); *Kennedy v. Dugger*, 933 F.2d 905, 914 (11th Cir. 1991); *Lesko v. Lehman*, 925 F.2d 1527, 1540-41, 1546 (3d Cir. 1991); *Williams v. Chrans*, 945 F.2d 926, 947 (7th Cir. 1991); *Blair v. Armontrout*, 916 F.2d 1310, 1322-24 (8th Cir. 1990); *Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir. 1990); *Smith v. Black*, 904 F.2d 950, 972 (5th Cir. 1990); *Hayes v. Lockhart*, 852 F.2d 339, 346-47 (8th Cir. 1988); *Robison v. Maynard*, 829 F.2d 1501, 1509 (10th Cir. 1987); *Williams v. Kemp*, 846 F.2d 1276, 1282-83 (11th Cir. 1988); *Henderson v. State*, 583 So.2d 276, 304 (Ala. 1990); *State v. Walden*, 905 P.2d 974, 1001 (Ariz. 1995); *People v. Miranda*, 744 P.2d 1127, 1161 (Cal. 1987); *State v. Reynolds*, 836 A.2d 224, 334 (Conn. 2003); *State v. Lawrie*, No. IK92-08-0180, 1995 WL 818511, *11 (Del. Nov. 28, 1995); *People v. Spreitzer*, 525 N.E.2d 30, 44 (Ill. 1988); *Templeman v. Commonwealth*, 785 S.W.2d 259, 261 (Ky. 1990); *Evans v. State*, 637 A.2d 117, 126 (Md. 1994); *Pickney v. State*, 538 So.2d 329, 341 (Miss. 1988); *State v. Ramsey*, 864 S.W.2d 320, 332 (Mo. 1993); *Bennett v. State*, 901 P.2d 676, 680 (Nev. 1995); *State v. Koedatich*, 548 A.2d 939, 998 (N.J. 1988); *State v. Compton*, 716 P.2d 837 (N.M. 1986); *State v. Rose*, 451 S.E.2d 211, 229 (N.C. 1994); *State v. Hill*, 661 N.E.2d 1068, 1077 (Ohio 1996); *Stouffer v. State*, 738 P.2d 1349, 1358 (Okla.Crim. App. 1987); *State v. Compton*, 39 P.3d 833, 845 (Or. 2002); *State v. Bell*, 393 S.E.2d 364, 372-73 (S.C. 1990); *State v. Irick*, 762 S.W.2d 121, 130 (Tenn. 1988).

This Court's precedents make clear that the only difference between the standard governing guilt-phase due process claims and sentencing-phase due process claims derives from the different purposes of each proceeding: due process violations in the guilt phase are measured by their effect on the "resulting conviction," *Darden*, 477 U.S. at 181, while due process violations in the sentencing phase are measured by their effect on "the jury's imposition of the death penalty . . . " *Romano*, 512 U.S. at 12-13.

B. Components of the Due Process Calculus.

To determine whether a prosecutor's remarks so infected a proceeding with unfairness as to make the jury's verdict a violation of due process, "examination of the entire proceedings is necessary." *Donnelly*, 416 U.S. at 643; *see also Darden*, 477 U.S. at 179 (remarks must be placed "in context"). The Warden's brief provides a selective rendition of this Court's precedents that does not reflect their requirement of review of the "entire proceedings." He culls from *Donnelly*, *Darden* and *Romano* a subset of the factors that those decisions deemed relevant, producing a rather odd lot, and then paraphrases the selected factors in ways that obscure their import for this case.

Read in their entirety, this Court's cases establish that "entire proceedings" review compels consideration of four distinct sets of factors, each of which has an obvious connection to the underlying touchstone of the analysis – the fundamental fairness of the proceeding. These factors are: (1) the prosecutor's argument; (2) relevant conduct by defense counsel; (3) relevant instructions by the trial court; and (4) the strength of the evidence presented to the jury. *See Donnelly*, 416 U.S. at 645 ("a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge"). Taken together, *Darden* and *Donnelly* provide both examples and general instructions concerning what is

relevant in each category; at some points, *Romano* adds further elaboration. We set out below, in this Court's language, what the Court has said matters in assessing whether unfairness infected a proceeding.

1. The Prosecutor's Argument.

The Court has made clear that within the universe of improper arguments, some are more likely to infect a proceeding with unfairness than are others. One focus of concern is whether "the prosecutor's remarks so prejudiced a specific right as to amount to a denial of that right." *Donnelly*, 416 U.S. at 643. In a parallel vein, the Court has warned against prosecutorial misconduct that "implicate[s] other specific [constitutional] rights of the accused." *Darden*, 477 U.S. at 182; *and see Donnelly*, 416 U.S. at 643 (noting that when specific guarantees are involved, this Court "has taken special care to assure that the prosecutorial conduct in no way impermissibly infringes on them").

A comment's level of "ambigu[ity]" is also relevant. *Donnelly*, 416 U.S. at 645. When the impropriety of a comment depends upon speculation as to whether jurors would "attach this particular [impermissible] meaning to it," *id.* at 644, an adverse effect on the fairness of the proceeding is less likely. This is particularly so when a "plethora of less damaging interpretations" exists. *Id.* at 647. On the other hand, when a prosecutor's comments or pieces of evidence are not susceptible to alternative implications, their potential for prejudice is not allayed by an "equally plausible" possibility that they could cut against a death sentence. *Romano*, 512 U.S. at 13-14.

Intentionality and forethought matter. Quite commonly, arguments are not "carefully constructed in toto before the event." *Donnelly*, 416 U.S. at 646. Consequently, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning." *Id.* at 647 "[I]mprovisation frequently results in syntax left imperfect and meaning less than crystal clear."

Id. Conversely, evidence that the offensive statements were made intentionally, as part of a concerted plan to produce prejudicial effects, makes it more likely that those statements swayed the jury.

In addition, frequency and repetition matter. Jurors are less likely to be improperly influenced by "isolated passages" than by repeated remarks or themes. *Id.* at 646. The length of remarks is relevant for the same reason. *Id.* at 647 (noting that impropriety, if any, was limited to "a few brief sentences"). Thus, remarks that are both extended and repeated are especially likely to produce fundamental unfairness.

Finally, whether the jury is "affirmatively misled" is of some importance. *Cf. Romano*, 512 U.S. at 9. A jury may be misled "regarding its role in the sentencing process," *id.* at 9, or it may be misled when the prosecutor "manipulate[s] or misstate[s] the evidence." *Darden*, 477 U.S. at 182.

2. Defense Counsel's Closing Argument.

As *Darden* emphasizes, the prosecutor's remarks must be placed in context. *Darden*, 477 U.S. at 179. One aspect of that context is whether "the objectionable content was invited by or responsive to the opening summation of the defense." *Id.* at 182; *see also id.* at 179 ("The prosecutor's comments must be evaluated in light of the defense argument that preceded it . . . "). Likewise, comments by defense counsel that follow the prosecutor's misconduct can ameliorate the effects of improper remarks. Where defense counsel can "turn[] much of the prosecutors' closing arguments against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against [the defendant]," it is less likely that the proceeding will be infected with unfairness than when counsel cannot or does not do so. *Id.* at 182.

3. The Trial Court's Instructions.

A general instruction that the arguments of counsel are not evidence is "customary," and may be helpful. *Donnelly*, 416 U.S. at 644. More significant is judicial attention to an improper remark in the form of "specific, disapproving instruction." *Id.* at 645. In *Donnelly*, the Court stressed that "the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it." *Id.* Absent such corrective instructions, the jury is less likely to disregard the prosecutor's remark.

4. The Strength of the Evidence.

Finally, assessing whether a proceeding was so infected with unfairness as to deny due process depends upon the "weight of the evidence" on the question to be decided by the jury. Strong evidence "reduce[s] the likelihood that the jury's decision was influenced by argument." *Darden*, 477 U.S. at 180. However, when considering the effect of improper arguments at the sentencing phase of a capital trial, courts must be mindful that the broad discretion inherent in the task of capital sentencing makes the penalty phase decision particularly vulnerable to improper influence. *Turner v. Murray*, 476 U.S. 28, 37 (1986) (reversing a death sentence but not the conviction where the trial court refused to question prospective jurors concerning racial bias); *Satterwhite v. Texas*, 486 U.S. 249 (1988) ("the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer").

The sum of this Court's precedents, then, is that lower courts evaluating a due process claim of prosecutorial misconduct in closing argument must focus on whether the improper arguments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. To answer that question, a

court must consider the "entire record," including the challenged comments, their potential for prejudice and the prosecutor's manifest intention in making them, whether they were invited or offset by defense counsel's arguments, any ameliorative instructions by the court, and the strength or weakness of the case for death.

III. WESTFALL'S ARGUMENT INFECTED THE SENTENCING PHASE OF WEAVER'S TRIAL WITH FUNDAMENTAL UNFAIRNESS.

Applying this Court's approved mode of constitutional analysis to Westfall's sentencing-phase summation demonstrates why his argument rendered the proceeding fundamentally unfair.

1. The Prosecutor's Argument.

First, Westfall's comments were not isolated or ambiguous. *See Donnelley*, 416 U.S. at 646. He emphasized his position as the elected district attorney and made assertions in that capacity which suggested that the jurors should defer to his expertise in evaluating the gravity of Weaver's crime relative to other murders;[25] he expressed

---

[25] *See, e.g.*, Pet. App. A-276 ("I know what my responsibilities are and I know what the right punishment is in this case. So if I'm wasting my time, I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here"); *Id.* at A-297 ("I'm the Prosecuting Attorney in this county. I decide in which cases we ask for the death penalty and in which cases we don't"). In *United States v. Young*, 470 U.S. 1, 17-18 (1985), the Court noted that it was improper for the prosecutor to make this type of argument because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." That danger is greater in a capital-sentencing process that "confine[s] the imposition of the death penalty to a narrow category of the most serious crimes," *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), because a jury urged to trust the prosecutor's experienced, authoritative judgment regarding the comparative gravity of the crime at bar and others that are beyond the

(Continued on following page)

his own judgment that the death sentence was the only appropriate punishment;[26] he told the jurors that this case was "bigger" than William Weaver and that, rather than focusing on the punishment that Weaver himself deserved,[27] the jury should "send a message" to drug dealers by delivering a death sentence;[28] he made emotional appeals to the jurors to have courage[29] and insisted that

---

jurors' knowledge is particularly likely to accept the prosecutor's judgment.

[26] *See, e.g.*, Pet. App. A-279 ("Well if this isn't it, what would it be. If this isn't a case where you can impose a death penalty, . . . then what case would you ever return it in. So if you were being honest with me . . . , then this has to be the case"); *id.* at A-298 ("If these facts don't justify, don't cry out for the death penalty, then what facts justify it"). The District Court concluded that this was an improper attempt to intimidate the jury into voting for the death penalty. *Id.* at A-52-53.

[27] *See, e.g.*, Pet. App. A-276-77 ("This is bigger than William Weaver. . . . It's bigger than all of us;" "You've got to look beyond William Weaver. This isn't personal. This is business"); *id.* at A-293-94 ("The one thing you've got to get through your head, this is far more important than William Weaver. This touches all the dope peddlers and the murderers in the world").

[28] *See, e.g.*, Pet. App. A-277 ("You people represent the entire community. You represent society. You have to send a message here"); *id.* at A-292 ("I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. . . . Life in prison? That's the message you want to send to the scum of the world"). The ABA Standard for Criminal Justice 15-3.4(d) (3rd ed. 1993), cmt. on "Improper Matters" states that a prosecutor should not make "[e]motional appeals to jurors for . . . vengeance, to create fear for their personal safety, [or] to make an example of the defendant . . . ". In *United States v. Young*, this Court acknowledged that the Criminal Justice Standards were "useful guidelines" for evaluating the propriety of prosecutorial argument. 470 U.S. at 8.

[29] *See, e.g.*, Pet. App. A-283 ("You've got to reach down [a reference to General Patton's exhortation about soldiers putting their hands into the "pile of goo" that was their buddy's face] and do what you know is right"); A-285 ("I hope you're going to do it. I hope you've got the guts to do it"). In *United States v. Young*, this Court concluded that it was improper for a prosecutor to exhort the jury to "do its job," reasoning

(Continued on following page)

there was no point in having the death penalty if they did not impose it in Weaver's case;[30] he analogized the jurors' duties to those of soldiers on a battlefield[31] and said it was right to "kill him now;"[32] he argued matters not supported by the record[33] and made thinly veiled racial allusions.[34]

---

that "that kind of pressure . . . has no place in the administration of justice." 470 U.S. at 17.

[30] Pet. App. A-294 ("And quite frankly, if you don't sentence him to death in this case, there's no point in having a death penalty"). ABA Standard 5-3.4(d), cmt. on "Improper Matters" states that prosecutors should not make arguments about the consequences of a particular outcome.

[31] *See, e.g.*, Pet. App. A-277 ("Sometimes killing is not only fair and justified, it's right. Sometimes it is your duty"); *id.* at A-298 ("George Patton was talking to his troops because the next day they were going out in battle. . . . And he was going to try and encourage them that sometimes you've got to kill and sometimes you've got ro risk death because it's right"). In *Viereck v. United States*, 318 U.S. 236 (1943), this Court held that prosecutorial argument including statements that "[t]his is a war;" "[w]e are at war;" "[y]ou have a duty to perform here;" "[a]s a representative of your Government I am calling upon every one of you to do your duty," were so offensive that they mandated a new trial despite defense counsel's failure to object. In this Court's view, the trial judge should have *sua sponte* put an end to the entire line of argument. *Id.* at A-242.

[32] Pet. App. A-277. The District Court found this line of argument highly improper. *Id.* at A-68.

[33] *See, e.g.*, Pet. App. A-280 ("Then I'm going to to tell you he was out of bullets, because if he hadn't been, Officer Cram would have been dead. . . . If he still had the gun and still had bullets, do you think he would have surrendered. . . ."). *Compare Darden*, 477 U.S. at 181 (finding that an argument did not render the proceedings fundamentally unfair because the prosecutor did not manipulate or misstate the evidence). The District Court found that Westfall's statement here was not a fair inference from the record and was intended to play on the jurors' fears. Pet. App. A-56.

[34] Pet. App. A-282-83 ("There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society. . . .").

Many of Westfall's improper comments were fundamentally at odds with this Court's decisions regarding the elements of a constitutionally permissible capital sentencing procedure and undermined those elements. For example, Westfall's repeated assertions that the jury's decision was "bigger than" and "not about" William Weaver cannot be reconciled with this Court's capital punishment jurisprudence recognizing that the jury's role at the sentencing phase is to make an "individualized assessment of the appropriateness of the death penalty." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also Penry v. Lynaugh*, 492 U.S. 302, 304 (1989) ("punishment should be directly related to the personal culpability of the defendant"); *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982); *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). Westfall also urged the jury to defer to his decision to seek death in the case on the ground that he was the elected prosecuting attorney and "top" law enforcement officer in the county. Pet. App. A-297. These comments are inconsistent with this Court's mandate in *Caldwell v. Mississippi*, *supra*, that the "jury cannot be led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[35] 472 U.S. at 328-29. Finally, the racially tinged parts of Westfall's argument, *i.e.*, his insistence that if the jury did not sentence Weaver, who is black, to death then the "animals" would "reign in the jungle" implicated Weaver's equal protection and due process rights.

These numerous improper arguments were no mere slips of the tongue made in the heat of trial. *See United States v. Young*, 470 U.S. at 10 (noting that sometimes improper comments do not warrant reversal because they

---

[35] Additionally, Westfall's comments analogizing the jurors' role to that of soldiers in combat who have a duty and responsibility to kill are inconsistent with this Court's decisions (and Missouri law) holding that the death penalty is never mandatory. *See Woodson v. North Carolina*, 420 U.S. 280, 301 (1976).

can be made "off the cuff"); *see also Dunlop v. United States*, 165 U.S. 486, 498 (1897). As previously noted, Westfall's argument in Weaver's case was unquestionably "scripted;" it was in most respects a recycled version of his penalty-phase summations in *Newlon* and *Shurn*. This fact, never mentioned in the Warden's brief, undermines the assertion that Westfall did not intend his comments to have their most damaging effect. Pet'r. Br. at 27.[36] In this connection, it bears repeating that at the time Westfall gave this argument, he knew that many of the same comments had been found unconstitutional by a federal court.

2. Defense Counsel's Closing Argument.

Defense counsel did not invite Westfall's comments by anything done in her sentencing presentation or argument, nor did she effectively rebut them. Westfall went first in closing, and his initial summation contained numerous improper remarks. Defense counsel's subsequent penalty-phase closing, for the most part, stuck to the evidence and argued for life based on Weaver's good character, his adaptability to confinement, and the inconclusiveness of the evidence of guilt. While defense counsel did attempt to counter at least one of Westfall's themes (that the jury should sentence Weaver to death to "send a message" to other "scum") by arguing that a sentence of life without parole would also send a message (Pet. App. A-292), this only led Westfall to make even more outrageous statements in his rebuttal argument.[37] And, since Westfall

---

[36] In *Donnelly*, where this Court gave the prosecutor the benefit of the doubt as to his intent, it noted that arguments are "seldom carefully constructed . . . before the event." 416 U.S. at 646-47. Westfall's were.

[37] The Warden implies that some of the remarks in Westfall's final summation were in response to Weaver's counsel's argument that a life sentence would also send a message. Pet'r. Br. at 26. This reasoning is perverse. It cannot be the case that when defense counsel seeks to undo some of the damage done by a prosecutor's initial summation, a prosecutor can respond with even more improper comments in rebuttal.

made the final argument – repeating improper comments or injecting new ones – defense counsel had no opportunity to diffuse the prejudice created by that final summation.[38]

3. The Trial Court's Instructions.

The trial court's instructions were inadequate to correct the prejudice caused by Westfall's arguments. The court did instruct the jury that arguments were not evidence (Pet. App. A-312), but that brief, general instruction, given by every trial judge in every case, could not possibly cure the harm caused by Westfall's relentless, gimleted, graphic, and wholly improper statements.[39] It is true that the trial court sustained a few of defense counsel's objections and instructed the jury to disregard some comments. *See, e.g.,* Pet. App. A-294. While that is relevant, it is not decisive:[40] a handful of sustained objections cannot defeat Weaver's claim, given that defense counsel's objections to many other improper remarks were overruled, *see, e.g.,* Pet. App. A-277, A-80, A-281, A-282, A-296, A-297, A-299, and that still other improprieties by Westfall were not objected to.[41] When one reviews the transcript of

---

[38] To the extent defense counsel did have an opportunity to respond to assertions made in the initial argument, the "response" about what "message" the jury would be sending to the community may have actually exacerbated the problem by putting the jury further off the job it was supposed to be doing, *i.e.*, thinking about appropriate punishment for Weaver the individual, not about the most appropriate message to drug scum.

[39] Furthermore, the court's instruction did not address the faults inherent in some of Westfall's most egregious statements, including his exhortation to "send a message," his analogy to jurors as soldiers in a war, or his statement that there was "no point" in having a death penalty if the jury did not sentence Weaver to die.

[40] *See Berger v. United States*, 295 U.S. 78, 85 (1935) (awarding a new trial because of the prosecutor's improper comments and finding that, in light of his pervasive misconduct, they were not corrected by the judge sustaining objections and admonishing the jury not to consider the comments).

[41] The Warden notes on several occasions that trial counsel failed to object to some of Westfall's improper statements. *See, e.g.,* Pet'r. Br.

(Continued on following page)

the whole argument, it is manifest that even the sustained objections did not stop the onslaught of improper remarks; they were mere bumps in the road.

4. The Strength of the Evidence.

Finally, contrary to the Warden's assertion, this was not a strong case for death. The prosecution presented no evidence in aggravation of punishment at the sentencing phase; Weaver's evidence in mitigation included (a) his lack of prior felony convictions, (b) his good and non-violent character; (c) his work with a variety of school and church youth programs; and (d) his capacity to adapt productively to imprisonment. There were several other obstacles to the prosecution's efforts to convince the jurors to impose death. The evidence of Weaver's guilt was circumstantial, and the prosecution's most damaging evidence came from that most unreliable of witnesses, a jailhouse "snitch." The homicide victim was not blameless. He was a drug user involved in the drug trade; and under the prosecution's theory of the case, this involvement gave rise to the motive for his death. The difficulty in securing a death sentence based on the evidence may well have been the reason Westfall chose to throw caution to the wind and engage in a *Newlon* replay[42] – deciding once again to "let it

---

at 6, 7. On direct appeal, the Missouri Supreme Court found that most of the improper comments were objected to; it rejected Weaver's complementary claim of ineffective assistance of counsel based on the failure to object. Pet. App. A-232. Furthermore, this Court has noted that "interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously." *United States v. Young*, 470 U.S. at 13. The Court has also noted that, regardless whether there was an objection, the trial judge has a responsibility to intervene in some instances. *Viereck*, 318 U.S. at 248.

[42] Westfall seemed to recognize that it was an uphill battle. *See, e.g.*, Pet. App. A-276 ("Maybe this is an exercise in futility. Maybe I'm wasting my time in even talking to you about death because your minds

(Continued on following page)

all hang out."[43] When his numerous improper arguments are evaluated in light of the entire proceedings, including the problems in the prosecution's case for guilt and death, it is clear that Weaver's sentencing was rendered fundamentally unfair.

IV. THE MISSOURI SUPREME COURT'S DECISION INVOLVED AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENTS.[44]

A. The "Unreasonable Application" Inquiry as Demonstrated by this Court.

In *Williams v. Taylor*, 529 U.S. 362, 407 (2000), the Court established that "a state-court decision involves an unreasonable application of this Court's precedent [within

---

are made up. I know there has been a lot of crying going on. But I know what my responsibilities are and I know what the right punishment is in this case. So if I'm wasting my time, I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here").

[43] In *Newlon*, the district court observed that Westfall's statement to co-workers the night before he gave the closing argument that he was going to "let it all hang out," proved to be true. *Newlon v. Armontrout*, 693 F. Supp. 799, 808 n.4 (W.D. Mo. 1998).

[44] Weaver first filed on April 18, 1996, six days before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996. Even though Weaver had exhausted his state remedies, *Lawrence v. Florida*, ___ S.Ct. ___, 2007 WL 505922, *4 (Feb. 20, 2007), the district court erroneously dismissed the petition without prejudice believing that since Weaver had filed a petition for writ of certiorari in this Court, it "lack[ed] jurisdiction of the instant action until the Supreme Court has had an opportunity to pass on the matter." *Weaver v. Bowersox*, No. 4:96-CV-774 (CAS) (E. D. Mo. July 1, 1996). After this Court denied certiorari, *Weaver v. Missouri*, 519 U.S. 856 (1996), Weaver refiled his *pro se* petition on November 12, 1996. Since Weaver properly filed a fully exhausted petition prior to the effective date of the act, he submits that § 2254(d) is inapplicable. *Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA is not applicable to cases that were pending prior to the effective date of the act).

the meaning of § 2254(d)(1)] if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Both prevailing opinions in *Williams* illustrate the process for determining the reasonableness *vel non* of a state-court decision under this construction of § 2254(d)(1). Those opinions examined the state court's decision rejecting Williams' ineffective-assistance-of-counsel claim and discovered that it deviated from the analysis required by *Strickland v. Washington*, 466 U.S. 688 (1984), in two ways that rendered the state court's application of *Strickland* unreasonable. First, the state court unreasonably applied *Strickland* when it "relied on the inapplicable exception" to that decision's prejudice inquiry announced in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Williams*, 529 U.S. at 397, 413-15. Second, the state court unreasonably applied *Strickland* when it "failed to evaluate the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-398, 415-16.

Consistent with the example set in *Williams*, this Court's subsequent decisions have demonstrated that the "unreasonable application" analysis required by § 2254(d)(1) is often driven by two central factors: the content of the state court opinion under review, and the nature of the federal rule the state court was obligated to apply. In *Early v. Packer*, 537 U.S. 3 (2002), the Court underscored the importance of the content of the state court's opinion as an indicator of either the state court's faithfulness to this Court's holdings, or its unreasonable deviations therefrom. There, the Ninth Circuit's grant of relief under § 2254(d)(1) on the basis of several assumptions it made about the state court's analysis was reversed because the actual content of the state court's opinion did not support those assumptions. Explaining the reversal, this Court made clear that the state court's adjudication of a constitutional claim will survive § 2254(d)(1) "so long as neither

the reasoning nor the result of the state-court decision contradicts" this Court's "cases." *Early*, 537 U.S. at 8. On the one hand, a state court need not take extra care to issue "formulary statement[s]" demonstrating its compliance with this Court's precedents; on the other hand, for a state court's federal constitutional adjudication to obtain insulation under § 2254(d), the "fair import" of the state court's opinion must be faithful to the rules laid down by this Court. *Early*, 537 U.S. at 9; *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (reversing a grant of relief where the court of appeals' findings under § 2254(d) were not borne out by the actual content of the state court's decision but were the product of a "readiness to attribute error" to the state court that was "inconsistent with the presumption that state courts know and follow the law").

The principles articulated in *Early* are reflected in other § 2254(d) decisions. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), it was the content of the Maryland Court of Appeals' opinion rejecting Wiggins' ineffective-assistance-of-counsel claim that revealed the state court's unreasonable failure to consider whether the evidence known to Wiggins' trial counsel would have led a reasonable attorney to conduct further investigation. *Wiggins*, 539 U.S. at 527-28 (citing *Wiggins v. State,* 352 Md. 580, 609, 724 A.2d 1, 16 (1999)) ("The state court merely assumed that the investigation was adequate . . . The Court of Appeals' assumption that the investigation was adequate thus reflected an unreasonable application of *Strickland*"). Likewise, in *Bell v. Cone*, 543 U.S. 447 (2005), the fact that the "State Supreme Court's reasoning in this case closely tracked its rationale for affirming the death sentences in other cases in which it expressly applied a narrowed construction of the same . . . aggravator" convinced this Court that the state court had not ignored the mandate of *Godfrey v. Georgia*, 446 U.S. 420 (1980), notwithstanding the

absence from the state court's opinion of any express indication that it had applied that mandate.

The nature of the relevant constitutional rule has also played a role in shaping this Court's approach to § 2254(d)(1) analysis. This was articulated most expressly in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), where the Court explained that, for purposes of § 2254(d),

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough, 541 U.S. at 663-64 (citing *Wright v. West,* 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment)).

Some rules are truly general in both formulation and operation, such that their application by state courts is circumscribed only by a requirement that they remain true to a broadly framed constitutional principle. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (explaining that relief from a "three strikes" sentence was unavailable under § 2254(d)(1) because the Eighth Amendment "gross disproportionality principle" lacks "precise contours"). Other rules, however, are general in their statement of a constitutional rule but acquire significant specificity through the analytical method that this Court has fashioned to govern their application. The rule of *Strickland* is perhaps the best known (but, as discussed below, certainly not the only)

example. Its rule – that a prisoner claiming ineffective assistance of counsel must show "that counsel's performance was deficient," and that "the deficient performance prejudiced the defense," *Strickland*, 466 U.S. at 687 – is paradigmatically general. Yet the reasonableness of a state court's application of the rule for § 2254(d)(1) purposes is ordinarily not difficult to measure. This is so because *Strickland* adjudication is informed by a well-developed set of methodological guideposts which serve the critical function of ensuring that the general rule is brought to bear in particular cases through structured, guided and deliberate examination of the relevant facts as they relate to the Sixth Amendment interests which the rule was intended to protect. *See, e.g.*, *Strickland*, 466 U.S. at 689 (a reviewing court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"); *Williams*, 529 U.S. at 397-98 (a reviewing court must "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation"); *Wiggins*, 539 U.S. at 527-28 (a reviewing court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

B. The Missouri Supreme Court Unreasonably Applied the Relevant Due Process Rule.

Like the rule of *Strickland*, the due process rule governing prosecutorial penalty-phase arguments consists of a fundamental constitutional principle and a set of well-defined guideposts for its application to the facts of specific cases. The due process standard prescribed by *Donnelly*, *Darden* and *Romano* is whether the prosecutor's remarks "so infected the sentencing proceeding with unfairness as to

render the jury's imposition of the death penalty a denial of due process." *Romano*, 512 U.S. at 12 (citing *Sawyer v. Smith*, 497 U.S. 227, 244 (1990); *Darden*, 477 U.S. at 178-81); *see* Part II *supra*. This Court's decisions make clear that in applying this standard, a reviewing court must be attentive to certain factors and modes of analysis. As a general matter, a court must evaluate the alleged due process violation in light of the "entire proceedings." *Donnelly*, 416 U.S. at 643.[45] More specifically, the court should consider: (1) the prosecutor's statements (including whether those statements implicated one or more other specific constitutional rights of the accused, were specific or ambiguous, were spontaneously made or chosen with calculation to convey the offending message, were isolated or pervasive, and were technically accurate or actually misleading); (2) whether defense counsel's own arguments invited the offending remarks or effectively countered them; (3) whether, and if so, to what extent, the trial court's instructions mitigated the effects of the prosecutor's remarks; and (4) whether the weight of the evidence on the question the jury was required to resolve was sufficiently overwhelming to reduce the likelihood that the jurors were improperly influenced by the offending remarks.

The Missouri Supreme Court conspicuously failed to follow these methodological guideposts – or any objectively reasonable facsimile thereof – in adjudicating Weaver's federal constitutional claim. Nowhere in its discussion of the claim did it give any indication that it acknowledged either the federal due process nature of Weaver's contentions or the process that this Court has developed for

---

[45] *See also Darden*, 477 U.S. at 179 ("It is helpful as an initial matter to place these remarks in context"); *id.* at 181 n.13 (responding to a dissenting opinion by emphasizing that the state court rejected Darden's claim "after a careful review of the 'totality of the record,'" and that the district court rejected the claim "after a 'thorough review of the record'") (internal citations omitted).

analyzing such contentions. *See* Pet. App. A-232 (citing *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo. 1982)) (stating the rule to be applied as "[t]he trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted"); *id.* at A-237 ("Our review of the penalty phase arguments discloses that these arguments are reasonable").[46] While *Early* establishes that a state court's failure to expressly cite this Court's precedents is not necessary to bring § 2254(d)(1) into play, *Early* also makes clear that the "fair import" of the state court's opinion must reflect faithfulness to the analysis prescribed by those precedents. The fair import of the Missouri Supreme Court opinion here reflects precisely the opposite.

The state court's initial deviation from the path marked by this Court's precedents was its failure to consider the totality of the record, or even the totality of the remarks on which Weaver based his due process claim. Of the five categories of remarks recognized by Judge Melloy in his opinion for the Eighth Circuit majority – all of which were derived from the same record and contentions that were before the state court – only two (categories (2) and (4)) are addressed in the state court opinion. The opinion reads as if the remarks in the remaining three categories either were not uttered by Westfall or were not challenged by Weaver. But they were.

No "readiness to attribute error," *Visciotti*, 537 U.S. at 24, is necessary to discern the state court's gross departure from accepted due process analysis in this case. The Missouri court's opinion contains tangible evidence that it ignored or overlooked important parts of the "totality" of

---

[46] While the state court did mention the Eighth Circuit's decision in *Newlon*, it did so only in a cursory attempt to distinguish the specifics of the prosecutor's arguments in the two cases. Pet. App. A-235.

Westfall's challenged remarks. In part IV.C. of its opinion,[47] the court stated that "Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase . . . " Pet. App. A-236. The opinion goes on to identify two of the prosecutor's arguments speculating about who else Weaver may have killed if circumstances had allowed; then it says, "Finally, [the prosecutor] argued that the death penalty would be a deterrent." *Id.* at A-237. Weaver's objection to the prosecutor's deterrence argument, however, was far from the "[f]inal[ ]" remark he challenged before the state court. He challenged three more, including the prosecutor's particularly offensive "war on drugs" remarks.[48]

Moreover, the state court's opinion – which looked only to whether the trial court "abuse[d] [its] discretion" by allowing argument that was "plainly unwarranted," Pet. App. A-232 – reflects no consideration of the other factors this Court has identified as components of appropriate analysis of a due process claim. The opinion contains no

---

[47] Weaver raised his challenges to the prosecutor's arguments in Claim IV of his state-court brief and organized the factual allegations and legal arguments supporting those challenges in subdivisions IV.A through IV.C. The state court tracked this organization in its own opinion, such that part IV.A. of the opinion addressed part IV.A of the brief, and so on.

[48] *See Bell v. Cone*, 543 U.S. at 460-61 (Ginsburg, J., joined by Souter and Breyer, JJ., concurring) ("This Court's opinion . . . does not grapple with the following scenario: A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point").

indication that the state court considered whether Westfall's arguments implicated any other specific constitutional rights, or whether they were pervasive, unambiguous, calculated or misleading. Likewise, the opinion does not reflect any evaluation of whether defense counsel was able to counter the offending remarks, or any analysis of the weight of the State's case for death as bearing on the likelihood that the jury would have been influenced by the prosecutor's arguments. And while the state court did note the trial court's curative instruction in one instance of the prosecutor's invocation of his status as elected district attorney, it did so only in isolation, without any indication that it considered the overall performance of the trial judge in overruling or sustaining defense objections to the prosecutor's numerous objectionable remarks or in fashioning instructions adequate to undo the damage done by those remarks to which objections were sustained. Pet. App. A-233. In short, if the state court was adhering to any rule, it was neither the rule this Court laid down in *Donnelly*, *Darden* and *Romano*, nor an objectively reasonable facsimile of that rule.[49]

The objective unreasonableness of the state court's decision is the more apparent if that decision is compared with what an analysis conducted according to this Court's precedents would look like. Such an analysis would recognize that every guidepost which the Court has provided for evaluating prosecutorial misconduct under the Due Process Clause points to the recognition that Westfall's closing arguments were of the extreme sort that infect a trial with radical and unrelieved unfairness. For example:

---

[49] While the argument set forth herein proceeds under § 2254(d)(1)'s "unreasonable application" clause, the state court's complete failure to follow – or even roughly parallel – the analysis this Court has prescribed also implicates § 2254(d)(1)'s "contrary to" clause. *See, e.g.*, *Williams*, 529 U.S. at 405 ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases").

- Far from involving only isolated improprieties, Westfall's two closing arguments featured a constant torrent of prejudicial tactics, running the gamut from attempting to overawe the jurors' judgment by references to Westfall's responsibility and experience as elected prosecutor in choosing to demand a death sentence for William Weaver; to telling the jurors to forget about William Weaver as an individual and sentence him to death in order to send a message to all the drug scum who "are taking our streets away from us"; to urging the jurors to "fight back" and do their "duty" like soldiers in a war who can find the "courage" to "kill him now" if they would only follow General Patton's admonition to reach down and put their hands in the goo of their murdered buddy's ruined face;

- Far from being spontaneous, these remarks were pre-planned, recycled from two previous trials, and defiantly delivered despite full knowledge that the Eighth Circuit, not two months earlier, had found a nearly identical set of arguments unconstitutional in another capital case tried by Westfall;

- The challenged remarks were specific, not ambiguous, in urging the jury to: view death as a sentence they, like soldiers, were duty-bound to mete out; give weight to the prosecutor's authoritative judgment that death was the only "right punishment" in this case; sentence Weaver to death not as anything "personal" but because a death sentence was necessary to keep drug dealers from capturing the streets and ruling them according to the law of the jungle; and forego reasoned, moral decision-making in favor of

"reach[ing] down into your belly, because that's where the death penalty comes from;"

- The challenged remarks were not merely emotionally inflammatory but also repeatedly implicated Weaver's independent Eighth Amendment right to be sentenced on the basis of his individual characteristics, and they contained coded allusions to Weaver's race;
- Defense counsel, for her part, neither invited the prosecutor's misconduct (a considerable portion of which occurred before she ever rose to speak at the penalty phase), nor effectively countered it (in part because an equally considerable portion occurred after her opportunity to argue had ended);
- The trial court's instructions were too little, too late, and, if anything, the trial court's sparse interventions despite repeated objections only reinforced through implicit endorsement the damage done by the prosecutor's improper arguments; and
- This was a penalty trial in which considerable mitigating evidence was presented on the defendant's behalf and in which the prosecution's evidence for death was far less likely to overwhelm the jury than was the sheer breadth, volume, variety and audacity of impermissible argument delivered by the prosecutor.

These are the factors that the Missouri Supreme Court should have considered under this Court's decisions in *Donnelly*, *Darden* and *Romano*. And these are the conclusions that the factors compel when they are considered in the light of the record before the state court. If the state court had applied the clearly established due process

rule according to the guideposts this Court has supplied, the only objectively reasonable decision it could have reached is that Weaver's right to a fair penalty trial was violated, and that his death sentence was due to be vacated.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

JOHN H. BLUME*
SHERI L. JOHNSON
TREVOR W. MORRISON
CORNELL LAW SCHOOL
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

KEIR M. WEYBLE
1247 Sumter St., Ste. 201
Columbia, SC 29201
(803) 765-1044

PHILIP HORWITZ
3460 Hampton, Ste. 205
St. Louis, MO 63139
(314) 481-6733

ERIC W. BUTTS
720 Olive St., Ste. 1630
St. Louis, MO 63101
(314) 621-1617

CHARLES A. WEISS
ELIZABETH C. CARVER
JOHN W. ROGERS
K. LEE MARSHALL
JAMES R. WYRSCH
BRYAN CAVE, LLP
One Metropolitan Square
211 N. Broadway, Ste. 3600
St. Louis, MO 63102-2750
(314) 259-2000

*Counsel of Record

Counsel for Respondent

FILED
MAR 1 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-313
(Capital Case)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
ANDREA K. SPILLARS
Chief Counsel, Public Safety Div.
STEPHEN D. HAWKE*
HEIDI C. DOERHOFF
RONALD S. RIBAUDO
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102-0899
Phone: (573) 751-3321
Fax: (573) 751-7094

* Counsel of Record

TABLE OF CONTENTS

Page

PETITIONER'S REPLY BRIEF

A. Petitioner's arguments for reversal are within the question presented and merit this Court's consideration. 2

B. The court of appeals' judgment does not rest on unchallenged, independent Eighth Amendment grounds. 8

C. The Missouri Supreme Court cannot be faulted for not having anticipated Weaver's current arguments. 9

D. The record does not support Weaver's repeated characterization of the prosecutor's arguments as "defiantly delivered" arguments "nearly identical" to two other arguments held improper by the court of appeals. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

American National Bank and Trust Company of Chicago v. Haroco, Inc., 473 U.S. 606 (1985). 2, 4, 5

Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313 (1971) 7

Buchanan v. Angelone, 522 U.S. 269 (1998) 9

Caldwell v. Mississippi, 472 U.S. 320 (1985) 8

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 4

Darden v. Wainwright, 477 U.S. 168 (1986) 2, 6, 7, 9, 10, 13

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 2, 6, 7, 9, 10, 13

Early v. Packer, 537 U.S. 3 (2002) 9, 10

General Talking Pictures Corporation v. Western Electric Company, 304 U.S. 175 (1938) 2, 3

Harmelin v. Michigan, 501 U.S. 957 (1991) 9

Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997) 9

Irvine v. California, 347 U.S. 128 (1954) 2, 3

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation, 510 U.S. 27 (1993) 3

Jones v. United States, 527 U.S. 373 (1999) 8

Neal v. Puckett, 286 F.3d 230 (5th Cir. 2002) 9

Newlon v. Armontrout, 693 F.Supp. 799 (W.D. Mo. 1988) 11, 12

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) 11, 12

Norfolk Southern Railway Company v. Sorrell, 127 S. Ct. 799 (2007) 5, 6

Nynex Corporation v. Discon, Incorporated, 525 U.S. 128 (1998) 4, 5

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995) 3

Procunier v. Navarette, 434 U.S. 555 (1978) 7

Romano v. Oklahoma, 512 U.S. 1 (1994) .. 2, 6, 7, 9, 10, 13

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999) 11, 12

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 4

Williams v. Taylor, 529 U.S. 362 (2000) 7, 9

Yee v. City of Escondido, 503 U.S. 519 (1992) 5

Zant v. Stephens, 462 U.S. 862 (1983) 8

CONSTITUTIONAL AND STATUTORY AUTHORITY

28 U.S.C. §2254(d)(1) 2, 6, 7, 9

OTHER

U. S. Supreme Court Rule 10(a) 8

U. S. Supreme Court Rule 14.1(a) 2, 5, 6

No. 06-313
(Capital Case)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

Weaver contends that the petition should be dismissed as improvidently granted because petitioner's merits-brief arguments are "radically at odds" and "irreconcilable" with the question presented and because they do not challenge what, in Weaver's view, is an independent Eighth Amendment ground for the court of appeals' judgment. Resp. Br. 17, 20. He also faults the Missouri Supreme Court for not conducting a lengthier analysis of his due process claim and repeatedly asserts that the prosecutor's arguments were nearly identical to arguments that the court of appeals had held improper in two other capital trials. None of these arguments has merit.

A. Petitioner's arguments for reversal are within the question presented and merit this Court's consideration.

The question presented in this case asks whether the court of appeals "exceed[ed] its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the penalty phase closing argument was 'unfairly inflammatory.'" Pet. for Cert. i.

Weaver does not dispute that petitioner's arguments are directed at showing that this question should be answered, "Yes." He contends, however, that because the question presented is prefaced by the statements that "this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be," petitioner cannot argue that *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994), constitute clearly established federal law" under §2254(d)(1) – even though Weaver himself agrees that those three cases "govern[]" his habeas claim. Resp. Br. 26.

First, the Court has never read a question presented as narrowly as Weaver urges it to do so here. In all but one of the Rule 14.1(a) cases that Weaver cites, the petitioners asked the Court to rule on issues that "quite clearly [were] not included in the question presented by their petition for certiorari." *American National Bank and Trust Company of Chicago v. Haroco, Inc.*, 473 U.S. 606, 609 (1985).

In *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938),[1] *Irvine v. California*,

---

[1] In *General Talking Pictures*, the Court granted certiorari on two questions concerning a purchaser's use of a

347 U.S. 128 (1954),[2] and *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation*, 510 U.S. 27 (1993),[3] for example, the Court refused to consider questions added to merits briefs that were not included in, and were analytically separate from, the questions listed in the petitions. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450

---

device manufactured under a patent and one question concerning unclaimed inventions. 304 U.S., at 177. At the merits stage, the petitioner sought to add questions concerning estoppel and invalidity due to anticipation by, or want of invention over, the prior patented art. *Id.*

[2] In *Irvine*, the petition tendered four "constitutional questions growing out of methods employed to convict petitioner on charges of horserace bookmaking and related offenses against the antigambling laws of California." 347 U.S., at 129. At the merits stage, petitioner tried to add two questions "concerning the application of an immunity statute of California and another attaching certain instructions given to the jury by the trial court." *Id.*

[3] In *Izumi*, the petition "presented a single question" for review: "Should the United States Courts of Appeals routinely vacate district court final judgments at the parties' request when cases are settled while on appeal." 510 U.S., at 30. In its brief on the merits, petitioner tried to add a question concerning the denial of an intervention motion. *Id.*

(1995),[4] and *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992),[5] the Court declined to address petitioners' arguments that federal statutes not mentioned in the questions presented or in the litigation below provided alternate grounds for reversing the lower courts' judgments. In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court likewise declined to address petitioner's argument that the jury instructions on seaman status under the Jones Act were reviewable only for plain error under Rule 51 of the Federal Rules of Civil Procedure when the question presented asked unreservedly, "What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C. § 688?" 515 U.S., at 353 n.*. And in both *Nynex Corporation v. Discon, Incorporated*, 525 U.S. 128 (1998),[6] and *American*

---

[4] In *Oklahoma Tax Commission*, petitioner argued for the first time in its merits brief that the Hayden-Cartwright Act, 4 U.S.C. §104, expressly authorized a state tax on Indian motor fuels sales, but the question presented asked only whether "principles of federal pre-emption or Indian sovereignty" precluded the tax. 515 U.S., at 456-457.

[5] In *Taylor*, the question presented was: "Whether, under Section 522(*l*) of the Bankruptcy Code, a bankruptcy court must exempt property from the bankruptcy estate, even though the debtor had no colorable basis for claiming the exemption, because no one objected to the claimed exemption within the period set forth in Bankruptcy Rule 4003(b)." Pet. for Cert. i, *available at* 1991 WL 11009241. At the merits stage, petitioner argued for the first time that the exemption was valid under "a different provision of the bankruptcy code, 11 U.S.C. §105(a)." *Taylor*, 503 U.S., at 645.

[6] In *Nynex*, the petitioner argued in its merits brief that respondent's antitrust complaint did not allege that their

National Bank and Trust,[7] *supra*, the Court did not address whether the underlying complaints alleged violations of the Sherman Act, 15 U.S.C. §1, and the Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. 1962(c), respectively, when the questions presented did not encompass the complained of pleading requirements. Finally, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court refused to address petitioner's alternate argument that a mobile home ordinance effected a regulatory taking, when the question presented asked only whether the lower court had erred by not agreeing with two federal appellate decisions that had held that similar mobile home ordinances effected physical takings, not regulatory takings. 503 U.S., at 536-537.

The remaining case that Weaver cites – *Norfolk Southern Railway Company v. Sorrell*, 127 S. Ct. 799 (2007) – also does not support his Rule 14.1(a) argument. There the Court granted certiorari to consider whether a state court erred in determining that "the causation standard for employee contributory negligence under [the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60,] differs from the causation standard for railroad negligence." 127 S. Ct., at 803 (internal quotations and emphasis omitted). In its merits brief, the petitioner sought to "expand the question presented to

---

purchasing decisions harmed the competitive process, but the questions on which the Court granted certiorari were limited to application of the *per se* rule. *Nynex*, 525 U.S., at 140; *Nynex* Pet. for Cert i, *available at* 1998 WL 283056.

[7] In *American National Bank*, the petitioners argued that respondents' RICO complaint did not adequately allege a violation of 18 U.S.C. §1962 because respondents did not show "that the enterprise was 'conducted' through a pattern of racketeering activity." 473 U.S., at 608. But the question presented was limited to causation for damages. *Id.*, at 608 n.*.

encompass *what* the standard of causation under FELA should be," arguing "that the [more rigorous] proximate cause standard reflected in the [state court] instruction for employee contributory negligence should apply to the railroad's negligence as well." *Id.*, at 803-804 (emphasis in original). Although the Court recognized that it "could consider the question of what standard applies as anterior to the question of whether the standards may differ," it declined to do so, observing that petitioner's current position was "contrary to the position it litigated below" (where it had argued that the less rigorous railroad liability standard should apply to employee contributory negligence), that petitioner had not objected to the railroad liability instruction, and that it would thus be "unfair" to the respondent to allow petitioner to "switch gears" at this late stage. *Id.*, at 804-805.

This case stands in sharp contrast to the Rule 14.1(a) cases that Weaver cites; petitioner is not asking the Court to rule on an issue outside the plain terms of the question presented. Here the issue of what constitutes the "clearly established federal law" under §2254(d)(1) for analyzing Weaver's habeas claim is subsidiary to the broad question listed in the petition: whether the lower court "exceed[ed] its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the penalty phase closing argument was 'unfairly inflammatory.'" Pet. for Cert. i.

The prefatory statements in the question presented do not change that. For one can rationally take the position that *Donnelly, Darden*, and *Romano* govern, or that they do not, yet still agree that "this court has never held a prosecutor's penalty phase closing argument to violate due process" nor "articulated, in response to a penalty phase claim what the standard of error and prejudice would be" for an allegedly improper penalty phase closing argument.

Second, even if it were possible to read the prefatory statements to limit the scope of the question presented, the Court should nonetheless reject Weaver's argument. The

Court's "power to decide is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978), citing *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 320 n.6 (1971). And in this case, it makes no sense to preclude petitioner from addressing the applicability of *Donnelly*, *Darden*, and *Romano*.

Weaver agrees that *Donnelly*, *Darden*, and *Romano* govern his claim, and he himself would have made that argument in his opposing brief had petitioner not done so first. *See* Resp. Br. 26. And so even if petitioner had limited his opening-brief arguments as Weaver suggests, petitioner unquestionably would have responded in his reply brief with essentially the same argument that is in his opening merits brief – that even if those three cases govern, the Missouri Supreme Court's decision is entitled to §2254(d)(1) deference.

Dismissing the case because petitioner made that argument in his opening brief rather than in his reply would be unfair to petitioner and result in a windfall to Weaver. Not dismissing the petition, on the other hand, simply leaves the issues inherent in the question presented and inevitably part of the case to this Court's full and fair consideration.

Finally, the fact that petitioner and Weaver agree that *Donnelly*, *Darden*, and *Romano* govern Weaver's substantive claim does not render the case unworthy of this Court's review. Since *Williams v. Taylor*, 529 U.S. 362 (2000), the broad standards for determining whether a state court's decision is "contrary to" or an "unreasonable application" of clearly established federal law under §2254(d)(1) have largely been settled. The problem with the underlying court of appeals decision is that it badly misapplied this Court's §2254(d)(1) precedents.[8] *See* Pet. Br. 28-30. That misapplication properly continues to deserve this Court's attention. *See* This Court's

---

[8] Notably, even Weaver's opposing brief makes no attempt to defend the court of appeals' analysis.

Rule 10(a) (certiorari review warranted were a federal court of appeals has "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory powers").

B. The court of appeals' judgment does not rest on unchallenged, independent Eighth Amendment grounds.

Weaver is also wrong to suggest that there is an unchallenged, independent Eighth Amendment ground for the lower courts' rulings. The district court granted Weaver habeas relief solely on the basis that "the prosecutor's improper penalty phase closing argument violated [Weaver's] due process rights." Pet. App. A-185. *See also id.*, at A-61, A-71-A-72 (same). In affirming the district court's judgment, the court of appeals likewise treated the issue as one of due process. *See* Pet. App. A-12 (stating due process standard before discussing the complained of prosecutorial remarks).

The court of appeals' citation to Eighth Amendment cases does not indicate an independent Eighth Amendment holding. The court cited Eighth Amendment decisions to inform its determination that Weaver's Fourteenth Amendment rights were violated.[9] *See* Pet. App. A-13-A-14, citing *Zant v. Stephens*, 462 U.S. 862 (1983); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Jones v. United States*, 527 U.S. 373 (1999);

---

[9] The court of appeals' treatment of Weaver's claim is consistent with Weaver's federal appellate briefs. For example, in the statement of issues section of his appellate brief, Weaver did not list any independent Eighth Amendment ground for his claim. Rather, he argued that the district court had "correctly" granted habeas relief when it found a due process violation, and cited one Eighth Amendment case in support of that point. Weaver App. Br. xii.

Buchanan v. Angelone, 522 U.S. 269 (1998); *Romano v. Oklahoma*, 512 U.S. 1 (1994); *Harmelin v. Michigan*, 501 U.S. 957 (1991). Nor would an independent Eighth Amendment holding make sense on the facts of this case. This Court has never held that prosecutorial remarks similar to those at issue here violate the Eighth Amendment.

Last, even if the court of appeals' decision could be read otherwise (a possibility petitioner denies), petitioner has challenged the court of appeals' reliance on Eighth Amendment precedent. *See* Pet. Br. 28-29 (faulting court of appeals for relying on "Eighth Amendment precedent not directly on point").

C. The Missouri Supreme Court cannot be faulted for not having anticipated Weaver's current arguments.

On the merits, Weaver argues that the Missouri Supreme Court's decision is not entitled to deference under §2254(d)(1)'s unreasonable application prong because the state court's treatment of his due process claim "conspicuously failed to follow" the *Donnelly/Darden/Romano* guideposts or to identify the same five categories of improper argument that the court of appeals did in its analysis. Resp. Br. 44-45. He is wrong.

Section 2254(d)(1) does "not require citation of" or even "awareness" if this Court's cases. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). And it does not it put federal courts in a "tutelary relation to the state courts" in terms of opinion writing. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (Posner, J.) (noting that the AEDPA amendments were designed to avoid such a result); *accord Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc). Rather, it requires federal courts to assess whether a state court's "adjudication of [a habeas] claim" involved an objectively unreasonable application of this Court's holdings. §2254(d)(1); *Williams*,

529 U.S., at 409-410.

These principles apply with particular force here. Weaver presented his habeas claim to the Missouri Supreme Court in truncated form, and he now attacks that court for having given his arguments essentially the same depth of treatment that he gave them in the state appeal. The relevant portion of Weaver's state appellate brief is reproduced on pages 44-61 of the Joint Appendix, and the relevant pages of the Missouri Supreme Court's decision are reproduced on pages A-232-A-237 of the Appendix to the Petition for Certiorari. A side-by-side comparison of these two passages shows that the Missouri Supreme Court's analysis closely tracks, in terms of length, substance, and structure, the arguments that Weaver made in his brief.

Notably, Weaver's state appellate brief nowhere mentions *Donnelly*, *Darden*, or *Romano* or any of the guideposts that Weaver now gleans from those cases. And it does not categorize the improper arguments into the five categories identified by the court of appeals.[10] Further, while Weaver now criticizes the Missouri Supreme Court for not addressing at length his argument that the prosecutor improperly urged imposition of the death penalty to further a societal "war on drugs," his state appellate brief gave short shrift to the argument, limiting it to a paragraph, and not

---

[10] For example, while the court of appeals concluded that the prosecutor's reference to the movie "Patton" was a category unto itself (category 1), Weaver's state appellate brief quoted the prosecutor's Patton reference only in the context of arguing that the prosecutor had improperly emphasized his position as the elected prosecutor. J.A. 50. Weaver's state appellate brief also lumped what the court of appeals called "statements by the prosecutor about his personal belief in the death penalty" (category 2) under the improper-emphasis-of-elected-position heading. J.A. 49.

quoting any of the allegedly improper remarks, as Weaver had done for the other claims that the Missouri Supreme Court discussed in detail. *See* J.A. 60-61 (providing only a string of citations to transcript pages for allegedly improper remarks).

To now allow Weaver to attack the Missouri Supreme Court's decision simply because that court followed his state appellate brief's lead in analyzing and assigning significance to the underlying aspects of his due process claim would serve only to frustrate the federalism principles that AEDPA was designed to further.

D. The record does not support Weaver's repeated characterization of the prosecutor's arguments as "defiantly delivered" arguments "nearly identical" to two other arguments held improper by the court of appeals.

Last, it bears mention that the record does not support Weaver's repeated assertions that the prosecutor's arguments in his case were "pre-planned," "defiantly delivered" arguments that were "nearly identical" to the arguments held improper in *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989), and *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999). Resp. Br. 48. *See also id.*, at 1, 19, 35-36 (similar).

At Weaver's state post-conviction relief hearing, the prosecutor testified that he was aware of the district court's *Newlon* ruling,[11] but not the specific grounds of the decision other than that it was partially based on the remarks made in

---

[11] *Newlon v. Armontrout*, 693 F.Supp. 799 (W.D. Mo. 1988), *aff'd* 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990).

closing argument.[12] The prosecutor was not aware of the court of appeals' decision in *Newlon* because it was not issued until a year after Weaver's July 1988 trial. *Shurn* was not decided until 1999 – more than a decade later.

In any event, both of those pre-AEDPA cases reversed capital sentences for prosecutorial arguments that were not present in Weaver's case. *See Shurn*, 177 F.3d, at 664-665; *Newlon*, 885 F.2d, at 1336 & appendix (arguments (i) asking the jurors to take an "eye for an eye," (ii) referencing well known serial killers, (iii) asking the jurors to think about the defendant or someone else killing or harming "your child," and (iv) repeatedly emphasizing the prosecutor's elected position, without objection by defense counsel or any curative instruction by the trial court).

Even if the arguments were similar enough to raise an inference that the prosecutor's arguments in Weaver's case were not extemporaneous, the court of appeals decision should

---

[12] At the post-conviction relief hearing, the prosecutor testified:

> "Q: And you -- And you were aware of the reasons [the *Newlon* sentence] was reversed [by the district court]?
>
> "A: I assume I was, yes.
>
> "Q: Okay.
>
> "A. Certainly generally, if not specifically.
>
> "Q: Okay. If you want to read that, do you recall why it was reversed?
>
> "A: My recollection is I don't recall all of the specific reasons. Certainly I recall that it -- there were some -- based somewhat on some of my remarks in closing argument.
>
> "Q: Okay.
>
> "A: But there may have been some other reasons as well. I don't recall." PCR Tr. 155.

nonetheless be overturned. The key inquiry under the *Donnelly/Darden/Romano* line of cases is not what the prosecutor subjectively intended to convey to the jurors, but what the jurors understood the prosecutor to be saying and whether it affected their decision to impose the death penalty. *See, e.g., Romano*, 512 U.S., at 12-14 (assessing whether jury would have given effect to evidence and whether it admission would have rendered "the jury's imposition" of the death penalty a denial of due process). For the reasons stated in petitioner's opening brief, the fairest contextual readings of the arguments about which Weaver complains are far less damaging than the readings that he or the court of appeals gives. And it is reasonable to conclude that those arguments did not deprive Weaver of due process.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
ANDREA K. SPILLARS
Chief Counsel, Public Safety Div.
STEPHEN D. HAWKE*
ALANA M. BARRAGÁN-SCOTT
HEIDI C. DOERHOFF
RONALD S. RIBAUDO
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102-0899
Phone: (573) 751-3321
Fax: (573) 751-7094

Counsel for Petitioner

**Counsel of Record*

March 2007

379 B397

No. 06-313
(Capital Case)

IN THE

Supreme Court of the United States

DONALD P. ROPER,
Superintendent, Polosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* INTERESTED FORMER OKLAHOMA CITY BOMBING PROSECUTORS IN SUPPORT OF RESPONDENT

CARTER G. PHILLIPS
JEFFREY T. GREEN*
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

February 26, 2007

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THIS COURT HAS GIVEN PROSECUTORS CLEAR GUIDANCE ON THE SCOPE OF PROPER ARGUMENT	3
A. This Court's Holdings Clearly Establish What Prosecutorial Arguments Are Inappropriate	4
B. This Court's Holdings Have "Clearly Established Federal Law" Relating To Prosecutorial Arguments	9
C. Prosecutors Understand This Court's Caselaw To Be Clearly Established Law On The Limits Of Prosecutorial Argument	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES Page

Anderson v. *Nelson*, 390 U.S. 523 (1968) 9
Berger v. *United States*, 295 U.S. 78 (1935) 1, 4, 5, 10, 12
Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 8, 11, 12, 13
Chapman v. *California*, 386 U.S. 18 (1967) 9
Darden v. *Wainwright*, 477 U.S. 168 (1986) 9, 10, 12, 13
Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974) 3, 7, 10, 12
Dunlop v. *United States*, 165 U.S. 486 (1897) 4
Fontane v. *California*, 390 U.S. 593 (1968) 9
McCleskey v. *Kemp*, 481 U.S. 279 (1987) 13
Strickler v. *Greene*, 527 U.S. 263 (1999) 1, 3
United States v. *Bagley*, 473 U.S. 667 (1985) 3
United States v. *Hasting*, 461 U.S. 499 (1983) 9
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 5, 6, 10, 12
United States v. *Young*, 470 U.S. 1 (1985) 7, 8, 10, 12
Viereck v. *United States*, 318 U.S. 236 (1943) 6, 7, 10, 11
Weaver v. *Bowersox*, 438 F.3d 832 (8th Cir.), *cert. granted*, 127 S. Ct. 763 (2006) 11
Williams v. *United States*, 168 U.S. 382 (1897) 4

STATUTE

28 U.S.C. § 2254(d)(1) 4, 10, 14

OTHER AUTHORITIES

Am. Bar Ass'n, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3d ed. 1993) 3, 13
ABA Model R. 3.4(e) 13
3.8 cmt. [1] 3

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former prosecutors who have handled capital cases and who have a continuing interest in the fair and effective functioning of the criminal justice system, both as a means to punish the guilty and to protect the innocent. *Amicus* Aitan D. Goelman served for nine years as a federal prosecutor with the U.S. Department of Justice. Mr. Goelman was a member of the Oklahoma City Bombing Task Force, and he was a trial prosecutor in the cases against Timothy McVeigh and Terry Nichols. *Amicus* Larry A. Mackey served for three years as a state prosecutor and eighteen years as a federal prosecutor. Mr. Mackey was also a member of the Department of Justice's trial teams for the cases against Timothy McVeigh and Terry Nichols, and he delivered the prosecution's closing argument in *United States* v. *Timothy McVeigh*. *Amicus* Beth A. Wilkinson is also a former federal prosecutor who was on the Department of Justice's trial teams for the cases against Timothy McVeigh and Terry Nichols, and who gave the sentencing-phase summation in *United States* v. *Timothy McVeigh*.

Amici believe that maintaining the "special role" of the prosecutor is a critical component of an effective criminal justice system. *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). In this special role, prosecutors are vigorous advocates for the government—but advocates who recognize that the government's fundamental interest in any criminal case "is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). As such, prosecutors have a unique duty stemming both from the

---

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

Constitution and from the traditions of the office to refrain from improper arguments that might lead a jury to base its decisions on emotion, caprice, or a misplaced trust in the prosecutor as representative of the government. This Court has clearly established that such arguments are improper, and its holdings have given prosecutors unequivocal and long-standing guidance about the appropriate bounds of advocacy. *Amici* submit that the Court should reaffirm that guidance here.

SUMMARY OF ARGUMENT

This case addresses a question that the *amici* are surprised to see. *Amici* are aware of a longstanding and broad body of cases prescribing the appropriate boundaries of argument for prosecutors, whose position of special authority carries significant weight and duties of fairness. *Amici* and other prosecutors understood this Court's caselaw as providing clear guidance about the appropriate scope of argument, both in ordinary closing arguments and in capital sentencing arguments.

The Court's numerous holdings in this area have identified several categories of argument as plainly impermissible. A prosecutor may not offer his or her personal opinions or otherwise encourage the jury to rely on the prosecutor's judgment instead of their own. In the same vein, prosecutors may not admonish jurors to "do their duty" or the like. Inflammatory and emotional arguments are similarly out of bounds. And, a prosecutor in a capital sentencing proceeding may not make arguments that could lead the jury to misunderstand its responsibility for the sentencing decision.

In addition, this Court's decisions have clearly established rules for courts to evaluate the prejudice from an improper argument. Courts must consider the overall context of the misconduct to determine the likelihood that the jury's decision was affected by the misconduct.

ARGUMENT

THIS COURT HAS GIVEN PROSECUTORS CLEAR GUIDANCE ON THE SCOPE OF PROPER ARGUMENT.

Every federal and state prosecutor in the United States has been entrusted with a "special role . . . in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. This special role "transcends that of an adversary," *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985), for a prosecutor's duty is "to seek justice, not merely to convict." Am. Bar Ass'n, *Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-1.2(c) (3d ed. 1993) (hereafter "*ABA Standards*"); see also ABA Model R. 3.8 cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). In short, prosecutors "represent not an ordinary party but We the People." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 651 (1974) (Douglas, J., dissenting).

In part because of this special role, a prosecutor's misconduct in argument has a significant potential to undermine the administration of justice. While both prosecutors and defense counsel have an ethical duty to refrain from improper and inflammatory arguments, prosecutors have a special responsibility in light of both the inherent power of their office and their commitment "to seek justice, not merely to convict." *ABA Standards* § 3-1.2(c). The natural respect and credence that most jurors will afford the government's representative means that improper statements and arguments by a prosecutor carry a high likelihood of unfair prejudice to a defendant. Instances of misconduct also adversely reflect on the office and on the vast

majority of prosecutors who conscientiously adhere to ethical standards. Such transgressions risk undermining public confidence in the criminal justice process.

For these reasons, this Court repeatedly has warned prosecutors not to stray beyond the appropriate bounds of argument, and it has long recognized the danger of unfair prejudice from improper prosecution argument. This Court's body of cases in the area has created a "clearly established Federal law" that both guides federal and state courts and gives clear instruction to federal and state prosecutors.

A. This Court's Holdings Clearly Establish What Prosecutorial Arguments Are Inappropriate.

For over a century, this Court has recognized that improper argument by a prosecutor can be "prejudicial to the accused." *Dunlop* v. *United States*, 165 U.S. 486, 498 (1897); cf. *Williams* v. *United States*, 168 U.S. 382, 398 (1897) (holding that prosecutor's comment on proffered testimony in open court was "highly improper" and "tended to prejudice the rights of the accused to a fair and impartial trial"). Contrary to Petitioner's crabbed view of the applicable caselaw,[2] there exists a broad body of cases in which this Court has established clear rules defining both what prosecutors may and may not argue and how courts should assess the prejudice from improper arguments. Below *amici* summarize the most important cases in which the Court developed this "clearly established Federal law." 28 U.S.C. § 2254(d)(1).

This Court's first detailed consideration of improper prosecution argument was in *Berger* v. *United States*, 295 U.S. 78 (1935). This Court reversed the *Berger* petitioner's conviction for conspiracy to issue counterfeit money, holding

---

[2] Petitioner makes the mystifying assertion that the only "'clearly established Federal law' applicable to [Respondent's] claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994)." Pet. Br. at 20. As the discussion below indicates, this is simply incorrect.

that the prosecutor had acted inappropriately both in his cross-examination of witnesses and in his closing argument. The Court held that the prosecutor's closing argument "contain[ed] improper insinuations and assertions"—the most prejudicial of which was the implication that his position made him privy to special knowledge of facts not in the record that supported conviction. *Id.* at 85. Namely, the prosecuting attorney argued that he "'knew'" that a witness could have identified Berger, and that her failure to do so on the witness stand was the result of "'complicated . . . rules of the game'" that precluded the prosecutor from eliciting this testimony. *Id.* at 86-87.[3]

The *Berger* court found this sort of misconduct to be particularly inappropriate because "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 88. The respected position that a prosecutor holds makes it all the more likely that a prosecutor's misconduct will have an prejudicial effect on the average jury. See *id.* ("Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."). For these reasons, this Court reversed Berger's conviction, finding it "highly probable" that this misconduct prejudiced the accused. *Id.* at 89.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), a prosecution under the Sherman Act for price-fixing, this Court considered a different species of improper

---

[3] his Court similarly condemned the prosecutor's *ad hominem* attacks on defense counsel. *See Berger*, 295 U.S. at 86 ("'But, oh, they can twist the questions, . . . they can sit up in their offices and devise ways to pass counterfeit money; "but don't let the Government touch me, that is unfair; please leave my client alone."'" (omission in original)).

argument—inflammatory characterizations of the defendant and claims that the jury had a duty to the community to convict. *Id.* at 238-40. This Court condemned the "appeals to class prejudice" in the prosecutor's closing argument—which included references to "malefactors of great wealth" and "eager, grasping men"—holding that such statements were "undignified and intemperate." *Id.* at 238-39. The Court concluded, however, that such statements were but "minor aberrations in a prolonged trial" and unlikely to influence the minds of the jurors. *Id.* at 239-40. This Court reached the same conclusion about the prosecutor's assertions of personal belief "'in the justice of the cause . . . espouse[d] here,'" and his "plea to the jury not to 'let your Government and the United States and its citizens and society down.'" *Id.* at 240. While such comments were "highly improper," they were only "isolated, casual episodes in a long summation of over 200 printed pages" and did not prejudice the jury. *Id.* at 242.

In *Viereck* v. *United States*, 318 U.S. 236 (1943), this Court again held that a prosecutor's inflammatory rhetoric and appeals to the jury's "duty" to convict could prejudice a defendant's right to a fair trial. *Viereck* was an appeal from a prosecution for failure to register as a agent of foreign principals, brought against an individual who had represented German principals. See *id.* at 239. In closing the prosecutor admonished the jurors that "'[t]his is war, harsh, cruel, murderous war'" and went on to analogize the jurors' duties to the duties of soldiers in combat[4] and to exhort the jurors to "'do your duty.'"[5] This Court found that these remarks were an emotional appeal to "passion and prejudice" that should

---

[4] *Viereck*, 318 U.S. at 247 n.3 ("'The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the Men who man the guns in Bataan Peninsula, and everywhere else.'").

[5] *Viereck*, 318 U.S. at 247 n.3 ("'You have a duty to perform here. As a representative of your Government I am calling upon every one of you to do your duty.'").

have been stopped by the trial judge *sua sponte*, and that the remarks prejudiced the defendant's right to a fair trial. *Id.* at 247-48 & n.3.

This Court again addressed the question of improper prosecution argument in *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). The only misconduct alleged in *Donnelly* was a single remark in closing argument suggesting that the defendant hoped for a conviction on a lesser offense (and not for acquittal), a remark which the jury was specifically instructed to disregard. See *id.* at 640-41. Under the circumstances this Court found that these "few brief sentences in the prosecutor's long and expectably hortatory closing argument" were not so prejudicial as to lead to a denial of constitutional due process. *Id.* at 647-48. But the Court reaffirmed its disapproval of this sort of prosecutorial misconduct and noted that some instances of misconduct "may be too clearly prejudicial for . . . a curative instruction to mitigate their effect." *Id.* at 644, 648 n.23.

In *United States* v. *Young*, 470 U.S. 1 (1985), this Court again decried a prosecutor's reference to his personal opinion and the attendant implication that the prosecutor's position gave him an authoritative and trustworthy perspective. Such advocacy "has no place in the administration of justice and should neither be permitted or rewarded." *Id.* at 9. The *Young* prosecutor told the jury in closing argument that his "personal impression" was that the defendant was guilty of fraud. *Id.* at 5. The Court noted that such statements "pose two dangers": (1) the danger that the jury would presume that the prosecutor was aware of evidence demonstrating guilt that was not presented to the jury, and (2) the danger that the jury might "trust the Government's judgment rather than its own view of the evidence." *Id.* at 18-19. In addition, this Court condemned the prosecutor's "exhort[ation] [of] the jury to 'do its job,'" holding that "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." *Id.* at 18. The Court

found, however, that these instances of prosecutorial misconduct did not unfairly prejudice defendant, largely because they responded to defense counsel's equally improper claim that none of the prosecutors believed the defendant was guilty. See *id.* at 4-5, 18-19. The Court also reasoned that prejudice from the improper remarks was unlikely in light of the "overwhelming," "substantial and virtually uncontradicted evidence" of the defendant's guilt. *Id.* at 19-20.

Caldwell v. *Mississippi*, 472 U.S. 320 (1985), first applied this Court's jurisprudence on prosecutorial argument in the context of a capital sentencing proceeding, holding that an argument that improperly lessened the jury's sense of responsibility for sentencing required reversal of the petitioner's death sentence. In his penalty-phase rebuttal argument, the prosecutor in *Caldwell* informed the jury that "your decision is not the final decision" because "the decision you render is automatically reviewable by the Supreme Court." *Id.* at 325-26. This Court found this argument to be "clearly improper," because the "uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333. This error was so prejudicial to warrant reversal of petitioner's death sentence, particularly in light of the fact that there was no corrective instruction. *Id.* at 339.[6]

In *Darden* v. *Wainwright*, this Court reviewed another prosecution closing argument in a death-penalty case, this time at the guilt-innocence phase. The Court held that the prosecutor's inflammatory emotional appeals and belligerent

---

[6] In light of *Caldwell*, petitioner's assertions in its question presented that this court has never "held a prosecutor's penalty phase closing argument to violate due process" or articulated any "standard of error and prejudice" for penalty phase claims are simply incorrect. Pet. Br. i. This Court should consider dismissing the writ of certiorari as improvidently granted.

castigation of the defendant "deserved . . . condemnation." 477 U.S. 168, 179 (1986). Among other objectionable remarks, the *Darden* prosecutor "made several offensive comments reflecting an emotional reaction to the case," including references to the defendant as an "animal" and wishes that the defendant had been killed already or had committed suicide. *Id.* at 180 & nn.11-12. The *Darden* Court found such comments to be "undoubtedly" improper. *Id.* at 180. However, the Court found that these improper comments did not deprive the defendant of a fair trial, in part because of "the overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges." *Id.* at 182 (internal quotation marks omitted). This Court noted that *Darden* presented markedly distinct circumstances than *Caldwell*, in part because the comments in *Caldwell* were made at the sentencing phase while those in *Darden* were made at the guilt-innocence phase—one in which "overwhelming" evidence of guilt was presented. 477 U.S. at 183 n.15.[7]

B. This Court's Holdings Have "Clearly Established Federal Law" Relating To Prosecutorial Arguments.

From *Berger* to *Darden*, this Court has drawn, sharply and distinctly, the proper boundaries of prosecutorial arguments. *Amici* have no doubt that this is—and was—a "clearly established Federal law" that guides prosecutors and courts

---

[7] While *amici* have endeavored to summarize this Court's most significant jurisprudence about prosecutorial argument, this brief does not exhaustively chronicle every case in which this Court has discussed the issue. For instance, several of this Court's decisions addressing the effect of a prosecutor's comment on a defendant's silence present analytically distinct issues and therefore have not been discussed in detail. *See, e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 510-11 (1983); *Fontane* v. *California*, 390 U.S. 593, 596 (1968); *Anderson* v. *Nelson*, 390 U.S. 523, 525 n.*, 526-28 (1968); *Chapman* v. *California*, 386 U.S. 18, 25-26 (1967).

nationwide. 28 U.S.C. § 2254(d)(1). In very specific terms, the Court has made plain the impermissibility of at least five different types of arguments. *First*, beginning in *Berger*, this Court established that a prosecutor may not make arguments that exploit the natural respect and credence that a jury will give a prosecutor. Such impermissible arguments include those that offer the prosecutor's personal opinions, see *Young*, 470 U.S. at 5; *Socony-Vacuum*, 310 U.S. at 240; *Berger*, 295 U.S. at 85-86, and those that allude to the prosecutor's position in a way that encourages jurors to rely on the prosecutor's opinions instead of their own. See *Viereck*, 318 U.S. at 247-48 & n.3; *Socony-Vacuum*, 310 U.S. at 240.

Second, this Court has disapproved arguments designed to rouse "passion and prejudice" against the defendant, whether those arguments are inflammatory characterizations of the defendant, see *Darden*, 477 U.S. at 180 & nn.11-12; *Donnelly*, 416 U.S. at 640-41; *Socony-Vacuum*, 310 U.S. at 238-40, personal attacks on defense counsel, see *Berger*, 295 U.S. at 86, 88, or other emotional appeals. See *Darden*, 477 U.S. at 180 & nn. 9-12.

Third, prosecutors may not admonish jurors that supporting the government's position is "their duty" to the government or to the community. See *Young*, 470 U.S. at 18; *Viereck*, 318 U.S. at 247-48 & n.3. A jury's duty is to render a verdict based on the evidence, not to favor a particular side. The same rule applies in the special context of a capital sentencing proceeding, where the jury's duty is to prescribe a sentence that is appropriate in light of all the relevant considerations, not to honor the government's wishes or to protect society.

Fourth, and relatedly, the prosecution may not analogize the jury's role to that of soldiers in wartime, an analogy that could lead jurors to conclude that their responsibility is to follow instructions or to defend the community—and not to

exercise their independent judgment. See *Viereck*, 318 U.S. at 247-48 & n.3.[8]

Fifth, this Court has established that prosecutors must not make arguments that could lead the jury to minimize the importance of its role in a death penalty sentencing. See *Caldwell*, 472 U.S. at 333.

These clearly established holdings cannot be cabined in such a way that they forbid only the specific phrases uttered by the prosecutors in the cases reviewed by this Court. As explained, they set forth standards barring defined categories of impermissible arguments. For example, *Caldwell* certainly establishes that a prosecutor may not instruct a jury that its decision "is not the final decision" on the death penalty, but it also establishes—in equally plain terms—that prosecutors may not make any other arguments that would lead the jury "to minimize the importance of its role." So too, *Berger*'s admonition that prosecutors may not exploit their position by asserting their personal opinions is not limited to the *Berger* facts (assertions about what a witness would have really testified to), but represents instead a more general bar on all arguments implying that the prosecutor has special knowledge or authority that ought to be obeyed.

Amici do not now and never before understood that the rules this Court has prescribed for closing arguments in non-death penalty cases do not apply with equal or greater force to sentencing-phase arguments in capital cases. A prosecutor's injection of personal opinion or inflammatory rhetoric is as objectionable in a sentencing argument as it is in an ordinary closing argument, and it is difficult to imagine that either a court or a prosecutor would reasonably conclude that the ordinary restrictions on prosecutorial argument somehow do

---

[8] *Amici* note that some of the statements at issue in this case are strikingly similar to the *Viereck* prosecutor's argument that the jury's duty to convict was like that of soldiers on the battlefield. *See Weaver* v. *Bowersox*, 438 F.3d 832, 836 (8th Cir. 2006).

not apply in a sentencing argument. Certainly capital cases—especially in the penalty phase—are emotional events. But that is all the more reason to take care to avoid precisely the types of impassioned appeals that this Court has prohibited. Wholly legitimate emotions can be expressed through the facts and the victim-impact witnesses. There is no place—and should be no need—for prosecutorial embellishment through personal or inflammatory remarks.

In addition, this Court has established straightforward guidelines for courts to assess the prejudice from any improper prosecutorial argument. In general, the prejudicial effect of prosecutorial misconduct must be judged in light of the context of the remarks. Important considerations include whether the misconduct was an isolated comment or part of a pattern of improper arguments,[9] whether the misconduct was a response to similar comments by defense counsel,[10] and whether the trial court mitigated any prejudice through a curative instruction.[11] And perhaps the most important factor is whether it is reasonably possible that the misconduct affected the jury's decision. Where the prosecution's evidence is overwhelming, it is unlikely that an improper argument could affect the jury's ultimate verdict. See *Darden*, 477 U.S. at 182; *Young*, 470 U.S. at 19-20. But where the case is a close one, prosecutorial misconduct may well tip the balance toward conviction. See *Berger*, 295 U.S. at 89.[12]

---

[9] *Compare Donnelly*, 416 U.S. at 640-41, *and Socony-Vacuum*, 310 U.S. at 242, *with Berger*, 295 U.S. at 84.

[10] *See Young*, 470 U.S. at 19.

[11] *Compare Donnelly*, 416 U.S. at 640-41, *with Caldwell*, 472 U.S. at 339.

[12] This last factor takes on particular significance in a capital sentencing proceeding. Where the jury is determining guilt or innocence, and where the prosecution has presented incontrovertible evidence of guilt, it can more easily be said that prosecutorial misconduct had no effect on the

C. Prosecutors Understand This Court's Caselaw To Be Clearly Established Law On The Limits Of Prosecutorial Argument.

As working prosecutors, *amici* used this Court's holdings to guide their closing arguments, and *amici* believe that prosecutors and state courts nationwide conscientiously are using this Court's holdings to guide their conduct. Indeed, prosecutorial ethical standards largely mirror this Court's jurisprudence. For example, the American Bar Association's Standards for Criminal Justice reflect the core principles that this Court has recognized. Standard 3-5.8 prohibits a prosecutor from "express[ing] his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant," from "mak[ing] arguments calculated to appeal to the prejudices of the jury," and from making "argument[s] which would divert the jury from its duty to decide the case on the evidence." *ABA Standards* 3-5.8 (b)-(d). The American Bar Association Model Rules of Professional Conduct similarly preclude counsel from "assert[ing] personal knowledge of facts in issue" and "stat[ing] a personal opinion" as to the case. ABA Model R. 3.4(e). The reflection of this Court's principles in these ethical standards underscores how "clearly established" this Court's holdings have become in the legal community.

For these reasons, *amici* strongly support respondent's contention that there is a "clearly established Federal law" barring improper closing arguments that extends well beyond

---

outcome. But in a capital sentencing proceeding where the jury is using its common sense to make an "individualized inquiry" into all the relevant circumstances, *McCleskey* v. *Kemp*, 481 U.S. 279, 303 (1987), it is much harder to say with assurance that an improper prosecutorial argument had no effect on the outcome. *Compare Darden*, 477 U.S. at 182 (finding no prejudice from misconduct in guilt-innocence phase of capital trial where the evidence of guilt was "overwhelming"), *with Caldwell*, 472 U.S. at 333 (finding prejudice from misconduct in sentencing phase of capital trial).

the three cases mentioned in petitioner's brief. 28 U.S.C. § 2254(d)(1); see Pet. Br. 20-22. This clearly established law informed how *amici* conducted their summations during their service as prosecutors, and it continues to govern the arguments made by prosecutors across the country. This Court should reaffirm its commitment to these reasonable rules that both allow prosecutors to advocate vigorously for their cause and restrain arguments that mislead and inflame, and this Court should make clear that these rules are clearly established Federal law that state courts must faithfully follow.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

CARTER G. PHILLIPS
JEFFREY T. GREEN*
MATTHEW J. WARREN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

February 26, 2007

396 A

No. 06-313

In The Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

WILLIAM WEAVER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL C. SMALL*
GIA KIM
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, California 90067-3012
Telephone: (310) 229-1000
Facsimile: (310) 229-1001
**Counsel of Record*

PAMELA HARRIS
Co-Chair, NACDL AMICUS COMMITTEE
1625 Eye Street N.W.
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE DUE PROCESS-RELATED QUESTION PRESENTED BECAUSE THE EIGHTH AMENDMENT FURNISHES A SEPARATE AND INDEPENDENT GROUND, UNCONSTRAINED BY AEDPA, FOR THE EIGHTH CIRCUIT'S DECISION	3
A. The Eighth Circuit Affirmed The District Court's Grant Of Habeas Relief On Both Due Process And Eighth Amendment Grounds	3
B. Petitioner Seeks Review Of Only The Due Process Aspect Of The Eighth Circuit's Decision	6
C. The Eighth Amendment Question, Which Is Not Fairly Included In The Due Process Question Presented In This Case, Provides An Independent Rationale For The Eighth Circuit's Decision	8
D. Because The Missouri Supreme Court Did Not Adjudicate Weaver's Eighth Amendment Claims On The Merits, AEDPA's Standard Of Review Does Not Apply To Those Claims	10

TABLE OF CONTENTS – Continued

Page

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING WHETHER THE EIGHTH CIRCUIT EXCEEDED AEDPA BOUNDS BECAUSE TO THE EXTENT THAT AEDPA EVEN APPLIES, IT DOES SO AS A RESULT OF THE DISTRICT COURT'S IMPROPER DISMISSAL OF RESPONDENT'S INITIAL, PRE-AEDPA HABEAS PETITION.... 15

A. Respondent's Pre-AEDPA Habeas Petition... 15

B. The District Court Abused Its Discretion In Dismissing Respondent's Pre-AEDPA Habeas Petition 17

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Appel v. Horn, 250 F.3d 203 (3d Cir. 2001) 14

Billings v. Polk, 441 F.3d 238 (4th Cir. 2006) 13

Buchanan v. Angelone, 522 U.S. 269 (1998) 5

Caldwell v. Mississippi, 472 U.S. 320 (1985) 5, 7, 8, 9

Darden v. Wainwright, 477 U.S. 168 (1986) 4, 8, 9

Duncan v. Walker, 533 U.S. 167 (2001) 18

Fay v. Noia, 372 U.S. 391 (1963) 17

Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000) 14

Harmelin v. Michigan, 501 U.S. 957 (1991) 5

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 9

Jones v. United States, 527 U.S. 373 (1999) 5

Lawrence v. Florida, No. 05-8820, 2007 WL 505972 (U.S. Feb. 20, 2007) 2, 17, 18

Muth v. Frank, 412 F.3d 808 (7th Cir. 2005) 10, 13

Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) 8, 19, 20

Rhines v. Weber, 544 U.S. 269 (2005) 18

Riley v. Cockrell, 339 F.3d 308 (5th Cir. 2003) 13

Romano v. Oklahoma, 512 U.S. 1 (1994) 5, 8, 9

Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999) 19, 20

State v. Weaver, 912 S.W.2d 499 (Mo. 1995) 10, 12, 13

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 3

TABLE OF AUTHORITIES – Continued

Page

Wainwright v. Sykes, 433 U.S. 72 (1977) 17

Woodford v. Garceau, 538 U.S. 202 (2003) 15

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

Zant v. Stephens, 462 U.S. 862 (1983) 5

STATUTES AND RULES

28 U.S.C. § 2243 10

28 U.S.C. § 2254(d)(1) ..... *passim*

S. Ct. Rule 14.1(a) 8, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII ..... *passim*

U.S. Const. amend. XIV 6, 7, 9, 10

OTHER AUTHORITIES

Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* (8th ed. 2002) 3

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL's more than 12,500 direct members – and 90 state, local, and international affiliate organizations with another 35,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges. NACDL is committed to preserving fairness within America's criminal justice system, including on matters related to the writ of habeas corpus and the application of the restrictions on habeas in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

SUMMARY OF ARGUMENT

Whatever the merits of Petitioner's contention that a federal court exceeds the bounds of AEDPA in overturning a capital sentence on the grounds that the prosecutor's penalty phase closing argument violated due process, this case is an inappropriate vehicle for resolving it for two reasons.

[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for *amicus* has made a monetary contribution to the preparation and submission of the brief.

First, the Eighth Circuit overturned Respondent's capital sentence in large part because the prosecutor's penalty phase closing argument violated the Eighth Amendment. However, Petitioner does not challenge the Eighth Amendment basis for the Eighth Circuit's decision – its challenge is limited to the due process issue. The Eighth Amendment thus furnishes a separate and independent ground for the Eighth Circuit's decision, and it will not be disturbed no matter the resolution of the due process question. Significantly, the Eighth Circuit's disposition of Respondent's Eighth Amendment challenge to the prosecutor's penalty phase close was not constrained by AEDPA, because the Missouri Supreme Court did not adjudicate that claim on the merits within the meaning of AEDPA. Even if Petitioner is correct on the due process question, the inapplicability of AEDPA to the Eighth Amendment claim further underscores the distinction between the Eighth Amendment and due process grounds on which the Eighth Circuit's decision rests.

Second, as suggested by this Court's decision just last week in *Lawrence v. Florida,* No. 05-8820, 2007 WL 505972 (U.S. Feb. 20, 2007), the district court erred when it dismissed Respondent's initial, pre-AEDPA habeas petition. Had the district court retained jurisdiction over that petition, AEDPA would not have applied to any of the claims in it, and there would have been no occasion for this Court to consider whether AEDPA barred the Eighth Circuit from overturning Respondent's death sentence.

For these reasons, the Court should dismiss the Petition as improvidently granted.

ARGUMENT

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE DUE PROCESS-RELATED QUESTION PRESENTED BECAUSE THE EIGHTH AMENDMENT FURNISHES A SEPARATE AND INDEPENDENT GROUND, UNCONSTRAINED BY AEDPA, FOR THE EIGHTH CIRCUIT'S DECISION.

This Court will dismiss a petition for certiorari as improvidently granted when it becomes apparent that "[d]ecision of the question upon which certiorari was granted may prove unnecessary because the judgment below was clearly correct on another ground." Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* 330 (8th ed. 2002); *see also The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). The Court should dismiss the Petition in this case as improvidently granted because the Eighth Amendment furnishes an alternative ground for the Eighth Circuit's decision, separate and independent from the due process question that is before this Court. Even if Petitioner is correct that the Eighth Circuit exceeded the confines of AEDPA in overturning Respondent's sentence on the grounds that the prosecutor's penalty phase closing argument violated due process, the decision's distinct Eighth Amendment predicate, which is not subject to AEDPA, would still stand.

A. The Eighth Circuit Affirmed The District Court's Grant Of Habeas Relief On Both Due Process And Eighth Amendment Grounds.

The Eighth Circuit held that the Missouri Supreme Court's conclusion that arguments made by the prosecutor

in his penalty phase close were "reasonable" was itself "unreasonable under existing United States Supreme Court precedents." Pet. App. A-15. The Eighth Circuit's decision makes clear that "the various applicable United States Supreme Court precedents" on which it relied, *id.* A-16, included both due process and Eighth Amendment precedents.

To be sure, the Eighth Circuit began its analysis by setting forth the relevant due process standard. It cited *Darden v. Wainwright*, 477 U.S. 168 (1986), for the proposition that "[a] prosecutor's argument violates due process if it 'infects[s] the trial with unfairness.'" Pet. App. A-12 (quoting *Darden*, 477 U.S. at 181). The Eighth Circuit went on, however, to apply not only the due process standard, but also this Court's Eighth Amendment standard requiring juries in capital cases to exercise discretion and make individualized determinations in deciding whether a particular defendant should be sentenced to death.

In structuring its analysis, the Eighth Circuit grouped the prosecutor's penalty phase arguments into the following five categories: "(1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs'; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')." Pet. App. A-13.

Applying this Court's precedents, the Eighth Circuit held that category (1), the soldier analogy argument, violated the Eighth Amendment. Citing *Zant v. Stephens*, 462 U.S. 862 (1983), the Eighth Circuit stated that "[d]escribing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment." *Id.* And citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Eighth Circuit stated that the soldier analogy "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment. . . ." *Id.* (internal quotation marks omitted).

The Eighth Amendment also formed a critical foundation of the Eighth Circuit's conclusion that the category (3) arguments, which included the prosecutor's statement that "executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs,'" were unconstitutional. Pet. App. A-14-15. Here, the Eighth Circuit stated that the generalized "war on drugs" arguments were improper because "[t]he controlling Supreme Court precedent is well-settled and longstanding: the Eighth Amendment requires capital sentencing to be an individualized decision-making process." *Id.* (citing *Jones v. United States*, 527 U.S. 373, 381 (1999); *Buchanan v. Angelone*, 522 U.S. 269, 274-75 (1998); *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994); *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991); *Zant*, 462 U.S. at 879). This Eighth Amendment analysis of those arguments furnishes a stand-alone ground for the decision below holding them unconstitutional.[2]

---

[2] The Eighth Amendment also may have factored into the Eighth Circuit's holding that categories (2), (4), and (5) – statements about the prosecutor's personal belief in the death penalty, assertions that the

(Continued on following page)

B. Petitioner Seeks Review Of Only The Due Process Aspect Of The Eighth Circuit's Decision.

Even though the Eighth Circuit expressly relied on both due process and Eighth Amendment grounds throughout its opinion, Petitioner sought a writ of certiorari on the following question presented:

> Since this court has neither held a prosecutor's penalty phase closing argument to violate *due process*, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory"?

Pet. i (emphasis added). While the Petition listed the Eighth Amendment, as well as the Fourteenth Amendment, as a constitutional provision involved, Pet. 1, and noted that the Eighth Circuit cited Eighth Amendment precedents, *id.* 11, Petitioner's merits brief unambiguously argues only the due process question and dispenses with any challenge to the Eighth Amendment portion of the Eighth Circuit's decision. The Table of Authorities to that brief does not even list the Eighth Amendment as a

---

prosecutor had a special position of authority, and arguments designed to appeal to the jury's emotions, respectively – were unconstitutional. Pet. App. A-14. The Eighth Circuit did not specify the nature of the constitutional violation worked by those statements. However, some of the language it used to describe the constitutional problem with categories (2), (4), and (5) – "contrary to a reasoned opinion by the jury," and "against a rational decision by the jury" – connotes Eighth Amendment principles. *Id.*

relevant constitutional provision. Pet. Br. at v. Further, Petitioner's merits brief characterized this case as implicating only due process: "[w]hen the court of appeals did refer to this Court's cases, it frequently referred to cases that did not address *due process claims like Weaver's, but Eighth Amendment precedent not directly on point.*" Pet. Br. at 28-29 (emphasis added).

In fact, Petitioner even faulted the Eighth Circuit for relying on "United States Supreme Court decisions construing the Eighth Amendment Cruel and Unusual Punishments Clause, not the Fourteenth Amendment's Due Process Clause." Pet. 11; *see also id.* 12 (arguing that *Caldwell* is inapposite because it "involved an Eighth Amendment challenge to a prosecutor's penalty phase closing argument, not a Fourteenth Amendment due process challenge to the penalty phase closing argument"). Petitioner's criticism is misplaced. The Eighth Circuit relied on the Eighth Amendment because Respondent advanced an Eighth Amendment challenge, in addition to his due process challenge, to the prosecutor's penalty phase close in briefing before the Missouri Supreme Court. *See infra* pages 10-11. In short, Eighth Amendment claims were very much a part of this case. Thus, it was entirely appropriate for the Eighth Circuit to address them.[3]

[3] The amicus brief of Criminal Justice Legal Foundation in support of Petitioner also wrongly upbraids the Eighth Circuit for considering Eighth Amendment issues. CJLF Br. at 19 (Eighth Amendment was "of no relevance to Weaver's due process claim respecting the prosecutor's penalty phase remarks").

C. The Eighth Amendment Question, Which Is Not Fairly Included In The Due Process Question Presented In This Case, Provides An Independent Rationale For The Eighth Circuit's Decision.

Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. Rule 14.1(a). To be "fairly included" in a petition for certiorari, a question must be more than merely "related" or "complementary" to the main issue raised. *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992). Even if two questions "might be subsidiary to a question embracing both," a question is not "fairly included" in another if the two issues "exist side by side, neither encompassing the other." *Id.* That is the case here.

As indicated above, a prosecutor's closing argument in a capital case violates due process if it "infect[s] the trial with unfairness." *Darden*, 477 U.S. at 181. A closing argument also violates the Eighth Amendment if, as indicated above, it eliminates "the responsible and reliable exercise of sentencing discretion" by relieving the jury of responsibility for its decision, *Caldwell*, 472 U.S. at 328-29, or preventing the jury from giving individualized consideration to the particular circumstances of the case, *Romano*, 512 U.S. at 7. Those are distinct standards, and while due process and Eighth Amendment attacks on a prosecutor's closing argument may be related in a given case, they also can stand alone. *See, e.g., Newlon v. Armontrout*, 885 F.2d 1328, 1336 n.9 (8th Cir. 1989) ("Because we find the closing argument, when viewed in its entirety, violates due process, we need not address Newlon's eighth amendment *Caldwell* claims. . . ."). Simply put, a closing argument that violates due process does not necessarily violate the Eighth Amendment, and vice-versa. Indeed,

Petitioner has conceded that Respondent's Eighth Amendment claims are distinct from the due process claims. *See, e.g.*, Pet. 13 ("The scope of review for an Eighth Amendment claim under *Caldwell* is separate from the concerns of the due process clause.").

This Court has admonished that "faithful application of Rule 14.1(a) . . . helps ensure that [it is] not tempted to engage in ill-considered decisions of questions not presented in the petition." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). Avoiding Rule 14.1(a) limitations, Petitioners in similar capital sentencing cases have explicitly raised both due process and Eighth Amendment claims in the question presented. For instance, in *Darden*, the question presented asked: "Did the prosecution's calculated, unprofessional and inflamatory [sic] closing argument rob the determination of petitioner's guilt of the fundamental fairness required by due process and deprive the determination of his sentence of the reliability required by the eighth amendment?" Pet. Br., 1985 WL 669179 (Oct. 28, 1985). The question presented in *Romano* was similarly comprehensive: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?" Pet. Br., 1993 WL 638239 (Dec. 22, 1993), at *i.

Here, by contrast, Petitioner has disavowed any challenge to the court of appeals' rulings that the prosecutor's "soldier" analogy and "war on drugs" arguments violated the Eighth Amendment. Those rulings thus would be unaffected by this Court's resolution of the due process question presented in the Petition.

D. Because The Missouri Supreme Court Did Not Adjudicate Weaver's Eighth Amendment Claims On The Merits, AEDPA's Standard Of Review Does Not Apply To Those Claims.

Under AEDPA, a federal court may issue a writ of habeas corpus where the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). However, the AEDPA standard applies only when the claim in question "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). When a state court did not adjudicate a claim on the merits, the federal court applies the general, less deferential habeas standard in 28 U.S.C. § 2243. *Muth v. Frank*, 412 F.3d 808, 814 (7th Cir. 2005). Here, the AEDPA standard does not apply to Weaver's Eighth Amendment claims because the Missouri Supreme Court did not adjudicate them on the merits.

After being convicted of first-degree murder and sentenced to death in Missouri state court, Weaver raised 21 claims of error on appeal to the Missouri Supreme Court. *State v. Weaver*, 912 S.W.2d 499, 507 (Mo. 1995). Claim IV argued that the prosecutor's improper arguments during the guilt and penalty phases deprived Respondent "of his rights to due process and freedom from cruel and unusual punishment, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 10 and 21 of the Missouri Constitution." Defendant's Brief to the Missouri Supreme Court at 17 ["Mo. Br."]; *see also id.* at 59 (prosecutorial arguments "deprived Mr. Weaver of his Federal and State Constitutional rights to due process and freedom

from cruel and unusual punishment"). In summarizing this argument in his brief to the Missouri Supreme Court, Respondent identified four categories of improper comments made by the prosecutor: (1) expressions of personal opinion that, as the elected prosecuting attorney, he would not have sought the death penalty unless it were warranted; (2) personal attacks on defense counsel; (3) appeals to the jurors' personal fears; and (4) suggestions of the prosecutor's knowledge of matters outside the record. *Id.* at 17, 59.

In the body of the brief, Respondent provided separate sections and headings marked "A. Position As The Elected Prosecutor" and "B. Attacks On Defense Counsel." *Id.* at 60, 64. Section A included Respondent's objection to the prosecutor's analogy of jurors to soldiers and references to graphic scenes in the movie *Patton*. *Id.* at 62. Section B discussed prosecutorial arguments implying that defense counsel had suborned perjury and fabricated Respondent's defense. *Id.* at 64-67.

Respondent addressed the remaining prosecutorial comments in a section titled "C. Other Improper Arguments." *Id.* at 67. These remaining prosecutorial statements, Respondent argued, "continued to remove reason from the sentencing decision." *Id.* at 67. They encompass matters lacking evidentiary support, including the prosecutor's arguments that Respondent would have shot a police officer or witness if he had the opportunity, that the death penalty is a deterrent, and that the prosecutor could have presented victim impact evidence. *Id.* at 67-68. Respondent also argued that the prosecutor impermissibly urged jurors to vote for death to advance the "War on Drugs" and help protect the community. *Id.* at 68.

The Missouri Supreme Court's treatment of Respondent's challenges to the prosecutor's argument mirrored the organization of Respondent's brief. Section IV.A of the Missouri Supreme Court's opinion discussed the prosecutor's comments about his elected position as it affected his decision to seek the death penalty. 912 S.W.2d at 512-13. Section IV.B of the opinion addressed the prosecutor's remarks about defense counsel. *Id.* at 513-14. Finally, in Section IV.C, the Missouri Supreme Court addressed the prosecutor's remaining penalty phase arguments. *Id.* at 514.

Nowhere did the Missouri Supreme Court address Respondent's Eighth Amendment claim, or even indicate that it recognized that Respondent had raised *any* constitutional claims. For instance, in Section IV.A, without mentioning Respondent's soldier analogy argument, the Missouri Supreme Court simply concluded that the trial court's rulings on the prosecutor's remarks were not an abuse of discretion. 912 S.W.2d at 513. The state court did not rely on or cite any Eighth Amendment cases. Nor did it invoke any Eighth Amendment concerns such as the need for reliability and individualized determinations in sentencing. *Id.* at 512-14.

Similarly, in Section IV.C, the Missouri Supreme Court addressed only "the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support." 912 S.W.2d at 514. The Missouri Supreme Court explicitly referred to the prosecutor's arguments that Respondent would have shot the arresting officer and a prosecution witness if he had the opportunity. The Court then stated: "Finally, he argued that the death penalty would be a deterrent." *Id.* It mentioned no other arguments. *Id.* It concluded that "these arguments are reasonable" because "[t]he fact that the crime had been planned

for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future." *Id.* Thus, the Missouri Supreme Court directly addressed and rejected Respondent's contention that the prosecutor argued matters lacking evidentiary support.

By contrast, the Missouri Supreme Court gave no indication that it considered, even in passing, whether the prosecutor's arguments on furthering the "war on drugs" and protecting the community violated either due process or the Eighth Amendment. It therefore failed to adjudicate what Judge Bye, in his concurrence below, deemed "Weaver's most compelling constitutional claim." Pet. App. A-19 (Bye, J., concurring in the result). As the Eighth Circuit observed, "[i]t is unclear which precedents the Missouri Supreme Court applied." *Id.* at A-15-16. What is clear, however, is that the Missouri Supreme Court did *not* apply any Eighth Amendment precedents or reasoning.

Because the Missouri Supreme Court apparently failed to recognize the nature of Respondent's constitutional challenge to the prosecutor's closing argument, it did not adjudicate the Eighth Amendment claim on the merits. *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003) (AEDPA standard of review does not apply where "the state court misunderstood the nature of the claim, and therefore did not adjudicate that particular claim on the merits"). Although even an unreasoned, summary disposition may constitute an "adjudication on the merits," "[i]f a state court specifically identifies a claim it must identify and review the correct claim," in order for the state court's action to reflect an adjudication on the merits for AEDPA purposes. *Muth*, 412 F.3d at 815 n.5; *see also Billings v.*

Polk, 441 F.3d 238, 252 (4th Cir. 2006) (no adjudication on the merits where North Carolina Supreme Court "did not consider – or at least there is no indication that it considered" petitioner's Sixth Amendment claim); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (no adjudication on the merits because Pennsylvania Supreme Court "recharacterized" .petitioner's constructive denial of counsel claim as ineffective assistance of counsel claim); *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) (no adjudication on the merits where Delaware court "did not pass on [petitioner's] Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so"). Accordingly, AEDPA's standard of review does not apply to the Eighth Amendment predicate for the Eighth Circuit's decision overturning Respondent's death sentence.

In the end, Petitioner's effort to dodge the substantial Eighth Amendment issues percolating throughout this case is unavailing. To determine whether the death sentence should stand, a meaningful review of the Missouri Supreme Court's decision would require this Court to do what the Eighth Circuit did: consider both the due process and Eighth Amendment challenges made by Respondent to each of the prosecutorial statements at issue, after determining the proper standard of review applicable to each constitutional challenge to each statement, as well as the possible interaction between the two constitutional provisions. The pre-AEDPA standard of review applicable to Respondent's Eighth Amendment claims would greatly complicate this task, even if Petitioner is right and AEDPA applies to the due process claims.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING WHETHER THE EIGHTH CIRCUIT EXCEEDED AEDPA BOUNDS BECAUSE TO THE EXTENT THAT AEDPA EVEN APPLIES, IT DOES SO AS A RESULT OF THE DISTRICT COURT'S IMPROPER DISMISSAL OF RESPONDENT'S INITIAL, PRE-AEDPA HABEAS PETITION.

This Court has held that "whether AEDPA applies to a state prisoner turns on what was before a federal court on the date AEDPA became effective. If, on that date, the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claims, then amended § 2254(d) does not apply." *Woodford v. Garceau*, 538 U.S. 202, 207 (2003). Here, on AEDPA's effective date, Respondent already had before the district court a habeas petition containing fully exhausted state court claims. The district court wrongly dismissed that initial petition, however, instead of staying it, pending the filing and disposition of a petition for a writ of certiorari in this Court. Had the district court retained jurisdiction pending certiorari proceedings, AEDPA would not have applied to any of Respondent's claims. Under these circumstances, this case is an inappropriate vehicle to resolve whether a federal court exceeds AEDPA's strictures when it overturns a capital sentence on the grounds that the prosecutor's penalty phase closing argument violated due process (or the Eighth Amendment for that matter).

A. Respondent's Pre-AEDPA Habeas Petition.

Respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the district court for the Eastern

District of Missouri on April 18, 1996, six days before AEDPA's effective date. NACDL App. 1-2. Before filing the petition, Respondent had received an extension of time, until June 21, 1996, to file a petition for writ of certiorari in this Court, and he indicated in the petition that he intended to do so. *Id.* at 14.

On May 3, 1996, the district court *sua sponte* stayed the habeas proceedings "pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver can file a petition for writ of certiorari." NACDL App. 16. Observing that the exhaustion doctrine does not require a prisoner to seek a writ of certiorari from the United States Supreme Court, *id.* at 15, the district court reasoned that "until Weaver actually files a petition for writ of certiorari, *his state claims are exhausted as they have been ruled upon by Missouri's highest court.*" *Id.* at 16 (emphasis added). However, the district court also concluded that if Respondent filed a petition for certiorari, his § 2254 petition would be "premature" and would therefore be dismissed without prejudice. *Id.*

Respondent moved for reconsideration of the May 3 Order, requesting that the district court allow his § 2254 petition to remain pending while Respondent pursued a writ of certiorari. NACDL App. 9. The district court denied the motion because it thought "it lack[ed] jurisdiction of the instant action until the Supreme Court has had an opportunity to pass upon the matter, assuming that Weaver files a petition for writ of certiorari as he has indicated." *Id.* at 10. Respondent also moved for immediate appointment of counsel, which the district court denied without prejudice because the habeas proceedings had been stayed. *Id.*

On July 1, 1996, after being informed that Respondent had filed a petition for a writ of certiorari in the Supreme Court, the district court dismissed Respondent's § 2254 petition without prejudice. NACDL App. 13. Respondent filed a notice of appeal on July 29, 1996, as well as a motion for a certificate of probable cause, or in the alternative, a certificate of appealability. *Id.* at 1. Respondent sought to appeal the district court's dismissal of his habeas petition and denial of his request for appointed counsel. *Id.* In an order filed on August 1, 1996, the district court stated that the question before it was "whether the certificate of appealability provision of the AEDPA applies to a habeas petition *filed before its effective date*." *Id.* at 3 (emphasis added). It held that AEDPA's certificate of appealability requirement did apply, and denied Respondent's motion for a certificate of appealability. *Id.* at 5.

B. The District Court Abused Its Discretion In Dismissing Respondent's Pre-AEDPA Habeas Petition.

The district court's dismissal of Respondent's pre-AEDPA petition was an abuse of discretion. This Court has held that state petitioners "need not petition for certiorari to exhaust state remedies." *Lawrence*, 2007 WL 505972, at *4; *see also Fay v. Noia*, 372 U.S. 391, 435-438 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977). Instead of putting Respondent (whom it knew was not represented by habeas counsel) to the Hobson's choice of either pursuing a writ of certiorari or preserving his right to pre-AEDPA review, the district court should have stayed the habeas petition while Respondent's petition for certiorari was pending.

In the analogous context of tolling AEDPA's one-year statute of limitations for seeking federal habeas relief from a state-court judgment, this Court has indicated that district courts should stay federal habeas petitions while petitions for certiorari are pending. Just last week in *Lawrence*, for instance, this Court concluded that "few practical problems" would result from requiring a state prisoner to file a federal habeas petition while a certiorari petition is pending. 2007 WL 505972, at *5. This Court reasoned that, because it rarely grants review from state postconviction proceedings, "the likelihood that the District Court will duplicate work or analysis that might be done by this Court if we granted certiorari to review the state postconviction proceeding is quite small." *Id.* Most fundamentally for the purposes of this case, "*a district court concerned about duplicative work can stay the habeas application until this Court resolves the case, or, more likely, denies the petition for certiorari.*" *Id.* (emphasis added).

Similarly, in *Rhines v. Weber*, 544 U.S. 269 (2005), this Court approved district courts' limited use of "stay and abeyance" procedures when confronted with a "mixed" habeas petition containing both exhausted and unexhausted claims. *Id.* at 277. The *Rhines* Court held that a district court likely abuses its discretion by dismissing a mixed petition "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that [the petitioner] engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition." *Id.* at 278; *see also Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Stevens, J., concurring

in part and concurring in the judgment) ("[I]n our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies."). Stay and abeyance was even more warranted here because Respondent had already exhausted his state remedies, and no comity reasons prevented the district court from retaining jurisdiction over a properly filed petition.

This Court should dismiss the Petition as improvidently granted because the district court's procedural error in dismissing the pre-AEDPA habeas petition is potentially outcome-determinative. Indeed, as Judge Bowman recognized in his dissent below, the possible application of AEDPA is the only factor that distinguishes Respondent's case from prior Eighth Circuit cases (one of which involved Respondent's co-defendant) where habeas relief was granted on the grounds of improper closing argument by the same prosecutor whose close is at issue here. As Judge Bowman put it:

> Were it not for the AEDPA standard of review, I might agree with the result reached by the Court today. Indeed, the outcome was different – where we did not apply the AEDPA standard – in our § 2254 review of Weaver's co-defendant's death sentence on grounds of improper prosecutorial closing argument in the penalty phase. *Shurn v. Delo*, 177 F.3d 662, 665-67 (8th Cir.), *cert. denied*, 528 U.S. 1010, 120 S.Ct. 510, 145 L.Ed.2d 395 (1999); *see also Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989) (affirming pre-AEDPA grant of the writ on grounds of improper prosecutorial argument), *cert. denied*, 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990). But under AEDPA,

> we are not empowered to grant the writ even though we may believe that the state court got it wrong.

Pet. App. A-21 (Bowman, J., concurring in part and dissenting in part).

In sum, on AEDPA's effective date, Respondent had before the federal district court a habeas petition containing only exhausted claims that were virtually identical to the claims the Eighth Circuit found meritorious in *Shurn* and *Newlon*. The imposition of a death sentence on Respondent – and the creation of precedent from this Court governing future post-AEDPA challenges to prosecutorial closing argument – should not turn on the fortuity that the district court erred in denying a stay and dismissing Respondent's pre-AEDPA petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be dismissed as improvidently granted.

MICHAEL C. SMALL
GIA KIM
AKIN GUMP STRAUSS
HAUER & FELD LLP

PAMELA HARRIS
NACDL AMICUS COMMITTEE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX,	)	
Respondent.	)	

ORDER

(Filed Aug. 1, 1996)

This matter is before the Court on petitioner William Weaver's ("Weaver") motion for leave to proceed *in forma pauperis* on appeal and motion for a certificate of probable cause, or in the alternative, certificate of appealability, filed on July 29, 1996. Weaver also filed a notice of appeal on July 29, 1996.

Weaver seeks to appeal this Court's July 1, 1996 Order, which dismissed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 without prejudice, as premature. Weaver contends the Court's dismissal of his petition as premature violated his constitutional rights. Weaver also contends that this Court erred in denying his motion for appointment of counsel without prejudice. Weaver asserts the Court was required to appoint him counsel pursuant to 21 U.S.C. § 848(q) (4) (B) and that the denial of his motion for counsel was a constitutional violation.

On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C.

§ 2254. Weaver indicated in his petition for writ of habeas corpus that he intended to pursue writ of certiorari to the United States Supreme Court concerning his adverse state court decision. Weaver also indicated that he had received an extension of time from United States Supreme Court Justice Clarence Thomas to file a petition for writ of certiorari to the United States Supreme Court on or before June 21, 1996. As a result, on May 3, 1996 this Court stayed the instant action pending either (i) Weaver's filing of a petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver could file a petition for writ of certiorari. Because the action was stayed the Court found Weaver did not require immediate legal counsel. The Court therefore denied Weaver's motion for appointment of counsel without prejudice.[1] *See* Order, June 11, 1996.

On June 28, 1996 the Court received a letter from Weaver's counsel in his state court proceedings, which stated that Weaver had filed a petition for writ of certiorari with the United States Supreme Court. Consequently, the Court dismissed Weaver's § 2254 petition without prejudice. The Court recognized that in the event a state prisoner chooses to pursue writ of certiorari to the United States Supreme Court, he must first exhaust that remedy before filing a federal habeas corpus petition. *Thomas v.*

---

[1] The Court notes that on June 3, 1996 Weaver filed an Application for Writ of Prohibition or Mandamus with the United States Court of Appeals for the Eighth Circuit, asserting that this Court erred in not appointing him counsel. On the same date Weaver also filed motions with the Court of Appeals to proceed *in forma pauperis* and for appointment of counsel. On June 25, 1996 the Court of Appeals denied Weaver's petition for writ of mandamus and his motions to proceed *in forma pauperis* and for appointment of counsel.

Howard, 303 F. Supp. 1385, 1386 (E.D. Ky. 1969). Moreover, a federal habeas corpus petition which contains claims that have not been fully exhausted must be dismissed. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982) (discussing requirement that district court dismiss habeas petition which contains unexhausted state claims); *see also Thomas,* 303 F. Supp. at 1386 (denial of federal habeas petition because a petition for writ of certiorari pending before the United States Supreme Court). Accordingly, the Court dismissed Weaver's petition without prejudice to refiling.

Weaver now moves the Court for a certificate of probable cause for appeal, or in the alternative, a certificate of appealability in connection with this Court's dismissal of his habeas petition without prejudice. Recently, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended the procedures by which habeas petitioners must seek appellate review of district court decisions. Section 102 of the AEDPA amends 28 U.S.C. § 2253, which had required a certificate of probable cause to appeal the denial of a habeas petition. Now, petitioners must request a "certificate of appealability." Weaver filed his habeas petition on April 18, 1996, before the AEDPA's effective date of April 24, 1996. Thus, the threshold issue before the Court is whether the certificate of appealability provision of the AEDPA applies to a habeas petition filed before its effective date.

This Court concludes that the AEDPA does apply to Weaver's petition and will review Weaver's alternative motion for a certificate of appealability. Although the title of the required certificate has been changed, the statutory standard for issuing a certificate of appealability is

phrased in the identical language previously used to determine whether to issue a certificate of probable cause. *See Reyes v. Keane,* ___ F.3d ___ 1996 WL 420347 at *4 (2d Cir. July 29, 1996) (noting that both a certificate of probable cause and certificate of appealability require a "substantial showing"); *Lennox v. Evans,* 87 F.3d 431, 434 (10th Cir. 1996) (same); *United States v. Campos,* ___ F. Supp. ___ 1996 WL 363105 at *5 (W.D. Tenn. June 19, 1996). Thus, because the same standard applies, application of § 102 of the Act to Weaver's request for a certificate of probable case is not a retroactive application of the statue. *Lennox,* 87 F.3d at 434.

28 U.S.C. § 2253(c), which formerly required a certificate of probable cause, now requires a certificate of appealability. The new section provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.

28 U.S.C. § 2253(c)(1)(A).

The new section further provides:

> A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253(c)(1)(B).

This statutory language requiring a "substantial showing" simply incorporates the language used by the Supreme Court in *Barefoot v. Estelle,* 463 U.S. 880 1983), which articulated the standard for determining whether to

issue a certificate of probable cause. *United States v. Campos,* 1996 WL 363105 at *5.

The Supreme Court stated that "probable cause requires something more than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement of § 1915." *Barefoot v. Estelle,* 463 U.S. at 893. "A certificate of probable cause requires petitioner to make a showing of the denial of a federal right." *Id.* A "substantial showing" of the denial of a federal right does not require the petitioner to show that he should prevail on the merits. *Id.* at n.4. Rather, the petitioner must demonstrate that (i) the issues are debatable among jurists of reason; (ii) a court could resolve the issues in a different manner; or (iii) the questions are "adequate to deserve encouragement to proceed further." *Id.* (citations omitted).

In this case, Weaver cannot establish the denial of federal right. Weaver's petition for writ of habeas corpus was properly dismissed without prejudice to permit him to fully exhaust his state remedies. Weaver has made no showing that a reasonable jurist could disagree with the Court's conclusions or that the Court could have resolved the issues in a different manner. To the contrary, the issues which Weaver seeks to appeal in connection with the dismissal of his habeas petition are well established against his position. *See Rose v. Lundy,* 455 U.S. at 510 (discussing requirement of district court to dismiss habeas petition which contains unexhausted state claims); *Victor v. Hopkins,* ___ F.3d ___ No. 95-2801, slip. op. at 11 (8th Cir. July 19, 1996). The Court therefore finds that Weaver's claims are without merit and his motion for certificate of appealability should be denied.

The Court notes that 28 U.S.C. § 2253(c)(1), which addresses the issuance of a certificate of appealability, refers to a "circuit justice or judge", while the accompanying amendment to Rule 22 of the Federal Rules of Appellate Procedure refers to action by the district court. Consequently, confusion surrounds the issue whether Congress intended that only the federal appellate courts issue a certificate of appealability. *See, e.g., United States v. Campos,* 1996 WL 363105 at *5 (noting that it is not entirely clear whether a circuit judge or district judge should address the appealability of a habeas petition); *Geiger v. Morton,* 1996 WL 361474 (D.N.J. June 24, 1996) (assuming that the phrase "circuit justice or judge" is intended to include district judges); *Houchin v. Zavaras,* 924 F. Supp. 115, 116 (D. Colo. 1996) (concluding that 28 U.S.C. § 2253 does not prohibit district judges from addressing the appealability of a habeas petition); *cf. Parker v. Norris,* ___ F. Supp. ___ 1996 WL 327488 (E.D. Ark. June 14, 1996) (concluding the district court lacked the ability to rule on petitioner's motion for certificate of appealability). Thus, to the extent a district court has the authority to rule on the issuance of a certificate of appealability, this Court will deny Weaver's motion as the Court concludes his claims are without merit. In addition, the Court will grant plaintiff's motion for leave to proceed *in forma pauperis* on appeal.

Accordingly,

IT IS HEREBY ORDERED that petitioner's alternative motion for a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that petitioner's motion for certificate of probable cause for appeal is **DENIED as moot.**

IT IS FURTHER ORDERED that plaintiff's motion for, leave to proceed *in forma pauperis* on appeal is **GRANTED.**

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 1st day of August, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX,	)	
Respondent.	)	

ORDER

(Filed Jun. 11, 1996)

This matter is before the Court on petitioner William Weaver's motion for reconsideration of the Court's May 3, 1996 Order and motion for appointment of counsel.

Petitioner William Weaver was convicted of first degree murder and sentenced to death. Weaver's conviction and death sentence were affirmed by the Supreme Court of Missouri on December 19, 1995. *State of Missouri v. Weaver,* 912 S.W.2d 499, 523 (Mo. banc 1995). On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Prior to Weaver's commencement of this action he received an extension of time from United States Supreme Court Justice Clarence Thomas to file a petition for writ of certiorari to the United States Supreme Court. Weaver's petition for writ of certiorari to the United States Supreme Court is due on or before June 21, 1996. Weaver indicates in his petition for writ of habeas corpus before this Court that he intends to pursue writ of certiorari to the United States Supreme Court.

On May 3, 1996 the Court stayed this case pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver can file a petition for writ of certiorari. Weaver was ordered to notify the Court in writing by June 28, 1996, whether he has filed a petition for writ of certiorari with the United States Supreme Court, or obtained a further extension of time in which to do so. The Court's May 3, 1996 Order explained that if Weaver files a petition for writ of certiorari with the United States Supreme Court, this case will be dismissed without prejudice to refiling, as Weaver must pursue his petition for writ of certiorari to completion before filing a habeas petition. *Thomas v. Howard,* 303 F. Supp. 1385, 1386 (E.D. Ky. 1969). If Weaver does not file a petition for writ of certiorari, the stay will be lifted and a briefing schedule will be established.

Weaver moves the Court to reconsider its May 3, 1996 Order and allow his § 2254 petition to remain pending before this Court while he pursues writ of certiorari in the United States Supreme Court.

As the Court previously noted in its May 3, 1996 Order, although a state prisoner is not required to apply for certiorari with the United States Supreme Court, he may nevertheless seek certiorari prior to filing a federal habeas corpus petition. In the event a state prisoner chooses to pursue writ of certiorari, he must first exhaust that remedy before filing a federal habeas corpus petition. *Thomas,* 303 F. Supp. at 1386. Moreover, a federal habeas corpus petition which contains claims that have not been fully exhausted must be dismissed without prejudice. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982) (discussing requirement of district court to dismiss habeas petition,

which contains unexhausted state claims); *see also, Thomas,* 303 F. Supp. at 1386 (denial of federal habeas petition because a petition for writ of certiorari pending before the United States Supreme Court). Thus, this Court concludes it lacks jurisdiction of the instant action until the Supreme Court has had an opportunity to pass upon the matter, assuming that Weaver files a petition for writ of certiorari as he has indicated. *See, e.g., Rose,* 455 U.S. at 518. The Court therefore will deny Weaver's motion for reconsideration.

Weaver also moves the Court to immediately appoint him counsel pursuant to 21 U.S.C. § 848(q) (4) (B).[1] In this instance, the Court finds that because proceedings in this action have been stayed Weaver does not require immediate legal counsel. The Court therefore will deny Weaver's motion without prejudice. However, if Weaver does not file a petition for writ of certiorari with the Supreme Court, the stay will be lifted and Weaver's motion for appointment of counsel will be promptly reconsidered on the Court's own motion.

Accordingly,

IT IS HEREBY ORDERED that Weaver's motion for reconsideration of the Court's Order of May 3, 1996 is **DENIED**. [Doc. 6]

---

[1] 21 U.S.C. § 848(q)(4)(B) provides that, "In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation . . . shall be entitled to appointment of one or more attorneys. . . ."

IT IS FURTHER ORDERED that Weaver's motion for appointment of counsel is **DENIED without prejudice.** [Doc. 7]

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 11th day of June, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX,	)	
Respondent.	)	

ORDER

(Filed Jul. 1, 1996)

This matter is before the Court on petitioner William Weaver's response to the Court's May 3, 1996 Order.

On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On May 3, 1996 the Court stayed this case pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver could file a petition for writ of certiorari. Weaver was ordered to notify the Court in writing by June 28, 1996, whether he had filed a petition for writ of certiorari with the United States Supreme Court, or obtained a further extension of time in which to do so. The Court's May 3, 1996 Order explained that if Weaver filed a petition for writ of certiorari with the United States Supreme Court, this case would be dismissed without prejudice to refiling, as Weaver must pursue his petition for writ of certiorari to completion before filing a habeas petition. *Thomas v. Howard,* 303 F. Supp. 1385, 1386 (E.D. Ky. 1969); *see also Rose v. Lundy,* 455 U.S. 509, 510 (1982)

(discussing requirement of district court to dismiss habeas petition, which contains unexhausted state claims).

On June 28, 1996 the Court received a letter from Weaver's counsel in his state court proceedings, which stated Weaver had filed a petition for writ of certiorari with the United States Supreme Court. Weaver's petition for writ of certiorari is currently pending before the Supreme Court. Consequently the Court will dismiss Weaver's habeas petition without prejudice.[1] The Court notes that dismissal of this action without prejudice does not preclude Weaver from filing another petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 following exhaustion of his state proceedings. Accordingly,

IT IS HEREBY ORDERED that the Clerk of the Court receive and file petitioner William Weaver's Petition for Writ of Habeas Corpus without payment of the required filing fee. *See* 28 U.S.C. § 1915(a).

IT IS FURTHER ORDERED that petitioner William Weaver's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is **DISMISSED without prejudice** as premature.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 1st day of July, 1996.

---

[1] The Court will grant Weaver's motion to proceed *in forma pauperis*. Accordingly, the Clerk of the Court will be ordered to file Weaver's petition for writ of habeas corpus preceding the dismissal of the petition without prejudice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER, Petitioner,	)	
v.	)	No. 4:96-CV-774 CAS
MICHAEL BOWERSOX, Respondent.	)	

ORDER

(Filed May 3, 1996)

This matter is before the Court *sua sponte*.

Petitioner William Weaver was convicted of first degree murder and sentenced to death. Weaver's conviction and death sentence were affirmed by the Supreme Court of Missouri on December 19, 1995. *State of Missouri v. Weaver,* 912 S.W.2d 499, 523 (Mo. banc 1995). On April 18, 1996 Weaver filed a Petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. Prior to Weaver's commencement of this action he received an extension of time from United States Supreme Court Justice Clarence Thomas to file a petition for writ of certiorari to the United States Supreme Court. Weaver's petition for writ of certiorari to the United States Supreme Court is due on or before June 21, 1996. Weaver indicates in his petition for writ of habeas corpus before this Court that he intends to pursue writ of certiorari to the United States Supreme Court.

"The particular factual and legal basis for the claim asserted in a state prisoner's federal habeas petition must

have been brought to the attention of the state courts in order to satisfy the exhaustion of state remedies requirement of 28 U.S.C. § 2254(b)." *Forest v. Delo,* 52 F.3d 716, 719 (8th Cir. 1995) (citing *Vasquez v. Hillery,* 474 U.S. 254, 257 (1986)). The exhaustion doctrine, however, does not require a prisoner whose sentence has been affirmed by the highest state court to seek certiorari from the United States Supreme Court before seeking habeas corpus relief in federal district court. *Fay v. Noia,* 372 U.S. 391, 435-38 (1963); *Makarewicz v. Scafati,* 438 F.2d 474, 477 (1st Cir. 1971). Although a state prisoner is not required to apply for certiorari with the United States Supreme Court, he may nevertheless seek certiorari prior to filing a federal habeas corpus petition. In the event a state prisoner chooses to pursue writ of certiorari, he must first exhaust that remedy before filing a federal habeas corpus petition. *Thomas v. Howard,* 303 F. Supp. 1385, 1386 (E.D. Ky. 1969). Moreover, a federal habeas corpus petition which contains claims that have not been fully exhausted must be dismissed. *See Rose v. Lundy,* 455 U.S. 509, 510 (1982) (discussing requirement of district court to dismiss habeas petition, which contains unexhausted state claims); *see also, Thomas,* 303 F. Supp. at 1386 (denial of federal habeas petition because a petition for writ of certiorari pending before the United States Supreme Court).

In the present case, Weaver has exhausted his state remedies and has received an adverse decision from the Supreme Court of the State of Missouri. Weaver has indicated, however, that he intends to file a petition for writ of certiorari with the United States Supreme Court. Weaver has received an extension of time to file a petition for writ of certiorari, which is due on or before June 21, 1996. The Court concludes that Weaver's petition for writ

of habeas corpus pursuant to 28 U.S.C. § 2254 is premature if Weaver chooses to pursue certiorari with the United States Supreme Court. *Thomas,* 303 F. Supp. at 1386. However, until Weaver actually files a petition for writ of certiorari, his state claims are exhausted as they have been ruled upon by Missouri's highest court.

Therefore, the Court on its own motion will stay the proceedings before this Court pending either (i) Weaver's filing of petition for writ of certiorari with the United States Supreme Court, or (ii) expiration of the time in which Weaver can file a petition for writ of certiorari. The Court will order Weaver to notify the Court in writing by June 28, 1996, whether he has filed a petition for writ of certiorari with the United States Supreme Court, or obtained a further extension of time in which to do so. If Weaver files a petition for writ of certiorari with the United States Supreme Court, this Court will dismiss Weaver's instant petition without prejudice as Weaver must pursue his petition for writ of certiorari to completion before filing a habeas petition. *Thomas,* 303 F. Supp. at 1386. If Weaver does not file a petition for writ of certiorari, the Court will lift the stay and proceed to establish a briefing schedule on the instant petition.

Accordingly,

IT IS HEREBY ORDERED that this action is **STAYED** pending further order of the Court, for the reasons set forth herein.

IT IS FURTHER ORDERED that petitioner William Weaver shall notify the Court by written memorandum filed no later than June 28, 1996, whether he has filed a petition for writ of certiorari with the United States

Supreme Court, or obtained an extension of time in which to do so.

/s/ Charles A. Shaw
CHARLES A. SHAW
UNITED STATES DISTRICT JUDGE

Dated this 3rd day of May, 1996.

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 06–313

DON ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, PETITIONER
v. WILLIAM WEAVER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 21, 2007]

PER CURIAM.

We granted certiorari in this case, 549 U. S. ___ (2006), to decide whether the Court of Appeals had exceeded its authority under 28 U. S. C. §2254(d)(1) by setting aside a capital sentence on the ground that the prosecutor's closing statement was "unfairly inflammatory." *Weaver* v. *Bowersox*, 438 F. 3d 832, 841 (CA8 2006). Our primary concern was whether the Court of Appeals' application of the more stringent standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996, (AEDPA), 110 Stat. 1214, was consistent with our interpretation of that statute. Cf. *Carey* v. *Musladin*, 549 U. S. ___ (2006). We are now aware of circumstances that persuade us that dismissal of the writ is the appropriate manner in which to dispose of this case.

The argument made by the prosecutor in this case was essentially the same as the argument that he made in two other cases—one of which involved respondent's codefendant. See *Shurn* v. *Delo*, 177 F. 3d 662, 666 (CA8 1999); *Newlon* v. *Armontrout*, 693 F. Supp. 799 (WD Mo. 1988),

aff'd, 885 F. 2d 1328 (CA8 1989). In each of those cases, the defendant received a death sentence. Also in each case, the defendant filed a petition seeking federal habeas relief before AEDPA's effective date. Federal habeas relief was granted in all three cases. The State does not question the propriety of relief in the other two cases because it was clear at the time, as it is now, that AEDPA did not apply to either of them.

Respondent argues, for the following reasons, that AEDPA should not govern his case either. Like the defendants in *Newlon* and *Shurn*, respondent filed his federal habeas petition before the effective date of AEDPA. Instead of considering respondent's claims, however, the District Court *sua sponte* stayed the habeas proceedings, noting that respondent had indicated his intention to file a petition for writ of certiorari seeking this Court's review of the state courts' denial of postconviction relief. Though the District Court recognized that respondent was not required to seek certiorari from this Court, it concluded that, if "a state prisoner chooses to pursue writ of certiorari, he must first exhaust that remedy before filing a federal habeas corpus petition." App. to Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 15. Thus, the District Court put respondent to a choice: He could forgo filing a petition for certiorari, or his habeas petition would be dismissed.

Respondent moved for reconsideration and for the appointment of counsel. The District Court denied both motions, reiterating its view that if respondent sought certiorari, his federal habeas petition would be premature. When respondent notified the District Court that a petition for certiorari had been filed, the court made good on its promise: It dismissed respondent's habeas petition "without prejudice" to his refiling "following exhaustion of his state proceedings." *Id.*, at 13. Though respondent had filed his habeas petition before AEDPA took effect, the

District Court dismissed his petition after the statute was in force.

Still without an attorney, respondent requested a certificate of appealability from the District Court. The court denied the request, opining that reasonable jurists could not disagree with the dismissal of respondent's petition. *Id.*, at 5–6. Respondent also filed a notice of appeal, which the Court of Appeals construed as a request for a certificate of appealability and rejected.*

Respondent refiled his habeas petition after this Court denied review of his state postconviction proceedings. The Eighth Circuit eventually concluded that, because respondent's petition was filed after AEDPA's effective date, his claims must be evaluated under that statute's strict standard of review. See *Weaver* v. *Bowersox*, 241 F. 3d 1024, 1029 (2001).

Our recent decision in *Lawrence* v. *Florida*, 549 U. S. ___ (2007), conclusively establishes that the District Court was wrong to conclude that, if respondent chose to seek certiorari, he had to exhaust that remedy before filing a federal habeas petition. *Lawrence* clarified that "[s]tate review ends when the state courts have finally resolved an application for state postconviction relief"—even if a prisoner files a certiorari petition. *Id.*, at ___ (slip op., at 4); see also *id.*, at ___–___ (slip op., at 4–5) ("[W]e have said that state prisoners need not petition for certiorari to exhaust state remedies" (citing *Fay* v. *Noia*, 372 U. S. 391, 435–438 (1963))). Thus, respondent's habeas petition, which was fully exhausted when filed, did not become unexhausted upon his decision to seek certiorari. Because the petition was not premature, the District Court had no

---

*Respondent did not seek rehearing or rehearing en banc in the Court of Appeals, nor did he file a petition for writ of certiorari from the denial of the certificate of appealability. Pursuit of either would almost certainly have been futile.

cause to dismiss it.

Whether this unusual procedural history leads to the conclusion, as respondent colorably contends, that the AEDPA standard is simply inapplicable to this case, is a question we find unnecessary to resolve. Regardless of the answer to that question, we find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent's pre-AEDPA petition.

Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 06–313

DON ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, PETITIONER
v. WILLIAM WEAVER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 21, 2007]

CHIEF JUSTICE ROBERTS, concurring in the result.

While I do not agree with all the reasons given in the *per curiam* for the discretionary decision to dismiss the writ as improvidently granted in this case, I do agree with that disposition.

SUPREME COURT OF THE UNITED STATES

No. 06–313

DON ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, PETITIONER
v. WILLIAM WEAVER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[May 21, 2007]

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

The Eighth Circuit held in this case that the Missouri Supreme Court had unreasonably applied clearly established precedent of this Court in concluding that certain statements made by the prosecutor during the penalty phase of respondent's capital trial did not rise to the level of a due process violation. *Weaver* v. *Bowersox*, 438 F. 3d 832, 839–842 (2006). As the Court says, *ante,* at 1, we granted certiorari to decide whether this holding comported with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2254(d)(1). We received briefing, and heard an hour's argument, on that question. Yet now the Court declines to answer it, dismissing the writ as improvidently granted.

The reason is that the Court has become "aware," *ante,* at 1, that respondent's post-AEDPA habeas petition was filed only because the District Court had erroneously dismissed an earlier petition filed prior to AEDPA's effective date, *ante,* at 3. Believing that respondent is "virtually identically situated" to two other litigants whose federal habeas petitions were not governed by AEDPA, and seeking to avoid "treat[ing the three] in a needlessly disparate manner . . . simply because the District Court

erroneously dismissed respondent's pre-AEDPA petition," the Court has decided to let stand the Eighth Circuit's flagrant misapplication of AEDPA, whether or not (and without deciding whether) AEDPA governs this case. *Ante,* at 4.

I fully agree with the Court that the District Court erred in dismissing respondent's pre-AEDPA petition, but that seems to me no justification for aborting this argued case. The District Court's previous error does not affect the *legal* conclusion that AEDPA applies to this new petition. And once it is admitted that AEDPA governs, the District Court's error should in no way alter our prior determination that the Eighth Circuit's application of AEDPA deserves our scrutiny. I discuss these two points in succession.

I

The Court provides no legal argument to support its assertion that respondent has a "colorabl[e]" claim, *ante,* at 4, that the prior erroneous dismissal renders AEDPA inapplicable to this case. Nor does respondent. See Brief for Respondent 39, n. 44. I am aware of no authority supporting the proposition that respondent is legally or equitably entitled to evade the collateral consequences of the District Court's error.

To begin with, any resort to equity would founder on respondent's failure to exhaust his appeals of the District Court's erroneous decision. See *ante,* at 3, n. The Court is untroubled by respondent's lack of diligence because, it says, further appellate review "would almost certainly have been futile." *Ibid.* The Court does not explain the basis for this pessimistic assessment, but the reason seems to be its belief that the District Court's error was not clear until our recent decision in *Lawrence* v. *Florida,* 549 U. S. ____ (2007). See *ante,* at 3 (describing *Lawrence* as "clarif[ying]" the exhaustion rule).

This seems to me quite wrong. The District Court's error was as apparent in 1996 as it was in *1966*. In *Fay* v. *Noia*, 372 U. S. 391, 435–438 (1963), we announced in no uncertain terms that a federal habeas petitioner need not seek certiorari in order to exhaust state-court remedies. "[N]o less an authority than Hart & Wechsler's The Federal Courts and the Federal System," *Massachusetts* v. *EPA*, 549 U. S. ___, ___ (2007) (slip op., at 17, n. 17), has long understood *Noia* to stand for that proposition. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1555 (3d ed. 1988); *id.*, at 1446 (4th ed. 1996); *id.*, at 1391 (5th ed. 2003). Indeed, *Lawrence*'s "clarifi[cation]" consisted of nothing more than citing the same old pages in *Noia*. See *Lawrence*, *supra*, at ___–___ (slip op., at 4–5). It logically follows from *Noia* no less inescapably than from *Lawrence* that final disposition of a pending certiorari petition is also unnecessary to exhaust state-court remedies.

That the District Court had erred was no mystery to respondent in 1996. He correctly asked the District Court to reconsider its decision to dismiss his habeas action, and instead to stay it pending disposition of his petition for certiorari (which is the proper procedural way to handle such duplicative filings). See App. to Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 8–11 (hereinafter NACDL Brief). And he then filed a notice of appeal and unsuccessfully sought a certificate of appealability. See *id.*, at 1–7. Respondent (who theretofore had shown himself to be a highly capable *pro se* litigant, undoubtedly aware of the availability of en banc and certiorari review) simply gave up too early. There is no more reason in this case than in any other to excuse the failure to make use of all available means of review. Far from thinking that a petition for certiorari "would almost certainly have been futile," *ante*, at 3, n., I think it would

almost certainly have been successful. We give special attention to capital cases (as today's delicate disposition shows), and since the District Court's denial of a certificate of appealability occurred on August 1, 1996, see App. to NACDL Brief 1, more than three months after AEDPA's effective date, see *Woodford* v. *Garceau*, 538 U. S. 202, 204 (2003), it would have been obvious that our refusal to correct the District Court's clear error would subject this defendant's renewed request for federal habeas relief to AEDPA's restrictions.

More fundamentally, however, even were the Court's conjecture correct that diligence on respondent's part would not have been rewarded, neither AEDPA nor any principle of law would entitle him to relief from the collateral consequences of an uncorrected judicial error. We held in *Daniels* v. *United States*, 532 U. S. 374, 382 (2001) that "[i]f . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (*or because the defendant did so unsuccessfully*), then that defendant is without recourse." (Emphasis added.) If a defendant is subject to *additional jail time* because a prior erroneous conviction went unreversed, surely respondent cannot complain about the fact that the District Court's prior uncorrected error has caused this habeas petition to be subject to AEDPA's entirely reasonable restrictions.*

II

There having been eliminated the possibility that AEDPA is inapplicable to this case (and hence that the question on which we granted certiorari and heard argu-

---

*Of course, even if some novel argument for the inapplicability of AEDPA exists, respondent and the Court have not explained why the claim has not been waived, given that this issue was raised *for the first time* in respondent's merits brief in this Court. See *infra*, at 5–6.

ment is not presented) what possible justification remains for canceling our grant of certiorari after full briefing and argument? There disappears, along with the claim of AEDPA inapplicability, any substance to the Court's contention that respondent is "virtually identically situated" to the two other litigants with similar claims, and that he is being treated differently "simply because the District Court erroneously dismissed [his] pre-AEDPA petition." *Ante,* at 4. No. He is being treated differently because he, unlike them, seeks federal habeas relief by means of a petition filed after AEDPA's effective date. Is what happened here any less rational, any less fair, a basis for differential treatment than the random fact that one petitioner's habeas action was filed a day before AEDPA's effective date, and another petitioner's could not be filed until one day after? Would the Court entertain the thought that if those two petitions involved the same sort of closing argument by the same prosecutor, the second of them would have to be exempted from AEDPA? If anything, the differential treatment is more justified here, since the later filing was not randomly determined, but was likely the consequence of respondent's failure to exhaust his appeals.

The Court seems to be affected by a vague and discomforting feeling that things are different now from what they were when we granted certiorari. They are so only in the respect that we now know, as we did not then, that respondent's earlier petition was wrongfully dismissed. That fact has relevance neither to the law governing this case (as discussed in Part I, *supra*) nor to any equities that might justify our bringing to naught the parties' briefing and arguments, and the Justices' deliberations, on the question for which this petition was granted. But what makes today's wasteful action particularly perverse is that it is *the fault of respondent* that we did not know of the wrongful dismissal earlier. Before we granted plenary

review, respondent had *never* argued that AEDPA should not apply because of the District Court's error. He made no such claim either time he was before the Eighth Circuit. See Brief for Appellee in *Bowersox* v. *Weaver*, No. 99–3462, pp. xvii–xix; Brief for Appellee/Cross-Appellant in *Bowersox* v. *Weaver*, No. 03–2880 et al., p. 7. And, more significantly, he remained completely silent in his brief in opposition, despite his obligation to raise the issue under this Court's Rule 15.2. Indeed, even in respondent's merits brief, his argument (if it can be called that) consists of three sentences explaining the procedural history followed by a conclusory assertion, all buried in footnote 44 on page 39.

Respondent's delayed invocation of this issue has not only not been sanctioned; it has been rewarded. Had respondent raised his specious claim of AEDPA inapplicability in a timely manner, petitioner would have had the opportunity to blow it out of the water. Whether by way of calculus or through dumb luck, respondent's tardiness has succeeded in confounding the Court. We promulgated Rule 15.2 precisely to prohibit such sandbagging—and to avoid the ill effects that minimal briefing has on the quality of our decisionmaking, as perfectly demonstrated by this case. Respondent and his counsel should not profit from their flouting of this Court's Rules.

* * *

I would thus answer the question on which we granted certiorari and received full briefing and argument. Because plenary review has convinced me beyond doubt that the Missouri Supreme Court did not unreasonably apply clearly established precedent of this Court, I would reverse the judgment of the Eighth Circuit.

A postscript is warranted in light of the unusual circumstances in which we dispose of this case. The greatest harm done by today's cancellation is not to the State of

Missouri, which will have to retry this murder case almost two decades after the original trial—though that is harm enough. The greatest harm is that done to AEDPA, since dismissing the writ of certiorari leaves the Eighth Circuit's grossly erroneous precedent on the books. (That precedent, by the way, cannot be explained away—as perhaps the Court's own opinion can—as the product of law-distorting compassion for a defendant wronged by a District Court's erroneous action. As noted earlier, the Eighth Circuit was not informed of that erroneous action. It presumably really believes that this is the way AEDPA should be applied.) Other courts should be warned that this Court's failure to reverse the Eighth Circuit's decision is a rare manifestation of judicial clemency unrestrained by law. They would be well advised to do unto the Eighth Circuit's decision just what it did unto AEDPA: ignore it.

For the foregoing reasons, I respectfully dissent.